United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

74-2340

To be argued by
LOUIS NIZER

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALLEN & COMPANY,

Plaintiff-Appellant,

—against—

OCCIDENTAL PETROLEUM CORPORATION,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE

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I

Introduction

This is an appeal from the judgment of the district court dismissing the complaint after a trial without a jury (116a-118a). This opinion of Judge Weinfeld reported at 382 F. Supp. 1052 determined all the facts in defendant's favor (75a-104a), and the sole question before this Court is whether said findings are "clearly erroneous" within the meaning of Rule 52(a), F.R. Civ.P.

The complaint was based upon a letter of the parties dated December 17, 1964 dealing with the obtaining of oil concessions in Libya through the intervention of Ferdinand Galic whereunder plaintiff had expressly conditioned its obligation so that it would have a prior right to agree to the cost of acquiring and exploiting any concession (20a-26a)—costs which could run "to hundreds of millions" of dollars—before committing itself (82a). Plaintiff claims that this letter created a joint venture between the parties entitling plaintiff to a 25 percent interest in the two concessions awarded to defendant by the Kingdom of Libya even though the concessions were not obtained through Galic and the parties had never resolved the ques-

tion of costs which had been left open. The complaint sought an accounting of profits or damages in excess of $100 million (75).

The lower court found that the letter sued upon was merely an agreement to agree in the future which never ripened into any binding agreement between the parties and that the concessions were obtained by defendant on the merits of its sealed bid in accordance with Libyan law without any assistance from Galic (82a-85a; 97a-98a; 103a).

The court also found that even if there were an agreement between the parties, it was justifiably terminated by defendant with plaintiff's consent, and that plaintiff's failure to assert any claim to the concessions until after defendant had expended many millions of dollars in discovering oil in Libya at its own risk, estops plaintiff from claiming any interest in the concessions in this action (89a-94a).

The pretrial order was entered on November 11, 1971, and the trial before Judge Weinfeld was commenced on September 10, 1973 and continued for a period of 21 days, at which time decision was reserved (35a-74a; 12a; 116a; 76a). The trial involved a transcript of 3,145 pages of testimony and hundreds of exhibits (116a; 76a). After a long deliberation, the trial court rendered a comprehensive decision dismissing the complaint on the merits (75a-104a), which was so well reasoned as to justify a summary affirmance "On the basis of that opinion alone". *SEC* v. *North American Research and Development Corp.*, 2 Cir., February 24, 1975, *Slip Opinion*, page 1906.

II

Standard of Review

The district court having found all the facts in defendant's favor after trial without a jury, and having determined the issue of credibility against the plaintiff and its witnesses, the standard of review is set forth in Rule

52(a) of the Federal Rules of Civil Procedure which provides that:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses."

This standard applies even though defendant may have presented its defense through depositions where the lower court had rejected the oral testimony of plaintiff and its witnesses in determining the facts. *Pan American World Air, Inc.* v. *Aetna Cas. & Sur. Co.*, 505 F. 2d 989, 1004-5 (2 Cir., 1974).

Statement of Facts

In early 1964, a "General" de Rovin informed Galic that he had powerful contacts in Libya who could be useful in obtaining oil concessions. Galic, a long-time friend of the Allens, conveyed this information to them and portrayed de Rovin as a man of great influence in Libya. Herbert Allen relayed this information to Dr. Armand Hammer, President of Occidental Petroleum Corporation. At that time Occidental had pending before the Libyan Government an informal application for concessions (77a; 36a; 129a; 470a-471a; 320a-321a; 1761a-1769a; 708a; 453a-454a; 531a).

Dr. Hammer agreed to meet with Galic and his group in London in September 1964 upon Herbert Allen's assurance that de Rovin was "persona grata in Libya" and that Galic was equally "prominent in Libya" (1769a; 470a-471a; 505a). There defendant agreed to retain Galic and his associates without any knowledge of the fact that de Rovin was an imposter and a convicted felon with a long criminal record having absolutely no standing in Libya, and that Galic was a business promotor with a questionable background (504a-506a; 1769a; 471a; 536a; 488a; 483a; 485a; 1773a-1775a; 1824a-1826a; 610a; 606a-608a; 77a-78a).

It became apparent that both de Rovin and Galic were relying upon the prominence of Ogbi in obtaining concessions in Libya. Ogbi's request for a small loan at the initial meeting was looked upon with disfavor by Dr. Hammer who requested a credit report on him which revealed that Ogbi was not the prosperous businessman he was represented to be (1155a-1158a; 658a-659a; 472a; 548a-549a; 568a; 466a; 468a).

Thereafter, Galic advised Dr. Hammer that he had found another contact, a Mr. Pierre Frottier, more qualified than Ogbi and who was close to a Tunisian named Slim. Galic suggested that a separate arrangement be made with him and his new contact (466a-467a; 565a-566a; 568a; 689a; 1154a).

On November 25, 1964 Dr. Hammer signed two additional letters regarding the same concessions mentioned in his earlier agreements (with Galic, de Rovin and Ogbi), one in favor of Frottier and the other in favor of Galic, without knowledge of the fact that Slim was also a crook and that Frottier was likewise unreliable. The letter to Frottier provided for an override royalty in the event Occidental received two concessions in Libya through his efforts and stated that unless the concessions were obtained with 45 days, the agreement would become null and void.* The letter to Galic was also subject to the same 45 day condition and provided for an additional commission in his favor in the event concessions were obtained through Frottier (1791a-1793a; 1209a; 1002a). Unbeknown to defendant, Frottier had agreed to share his compensation with the Allens, de Rovin, Galic and others (2167a).**

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* On December 13, 1964 the agreements were extended for an additional 45 days (1805a; 1798a). Thereafter, no further extensions were granted and on February 25, 1965 the agreements expired (1154a).

** The evidence also revealed that in violation of their agreements, de Rovin had assigned a portion of his compensation to Galic; Ogbi had assigned 10 per cent of his commission to de Rovin, who in turn conveyed half of that 10 per cent to Galic, without defendant's knowledge or consent (1774a-1775a; 2217a; 86a-87a).

Upon learning of the new arrangement with Frottier and Galic, plaintiff requested a participation therein upon the same terms and conditions applicable to the agreements made previously with Galic, de Rovin and Ogbi which was agreeable to defendant (570a-572a; 665a; 1795a; 574a; 349a). This was done (571a; 573a-574a; 349a).

The irresponsible list of characters foisted on the defendant thus continued to grow.

Plaintiff Refuses to be Bound by Contract

At plaintiff's request, defendant submitted to it a letter of December 17, 1964 setting forth the proposal (1800a; 37a). Herbert Allen telephoned Dr. Hammer to complain that a vital condition had been omitted, namely the plaintiff's right to prior approval of costs before it would be bound. Herbert Allen discussed the matter with his brother Charles and with their attorney who suggested the express language to be inserted in Dr. Hammer's letter which would protect plaintiff from being bound, namely that the costs should be mutually agreed upon and that Dr. Hammer's proposal should be amended accordingly in order to protect the plaintiff against an enormous financial exposure without its prior consent (571a; 372a; 274a-275a; 1450a-1455a).

This amendment took the form of an ink modification made in the handwriting of Herbert Allen on the face of Dr. Hammer's letter by adding after the word "costs", the phrase "to be mutually agreed upon", so that the sentence as corrected would read "This includes sharing costs to be mutually agreed upon and profits" (1801a; 37a). On December 24, 1964 Herbert Allen wrote Dr. Hammer, stating:

> "I am returning herewith your letter of December 17th in duplicate with just *one major change* and that is, that the cost should be 'to be mutually agreed upon', and I have initialled same.

"If there is no disagreement in this matter will you be kind enough to send me an initialled copy for my files." (Emphasis added) (1803a; 37a)

The amended proposal was accepted by Dr. Hammer on December 28, 1964 by initialling the ink modification made on the face of his letter and returning it to Herbert Allen on the same day with a covering letter (1801a; 1804a; 37a; 572a).

It was conceded that the letter of December 17, 1964 as amended, contains the entire understanding between the parties regarding their obligation to share in any of the costs involved in obtaining and developing oil concessions in Libya (336a; 36a). Plaintiff further admitted that the parties never reached any mutual agreement regarding the costs and expenses of obtaining and developing oil concessions in Libya and that the phrase "to be mutually agreed upon" was intended to include all these costs and expenses (302a-41a-42a). Herbert Allen testified:

"Q. What was the cost to be mutually agreed upon as you understood it in your conversation with Dr. Hammer?

A. Whatever costs were incurred in relation to Libya."

* * *

"Q. What costs were to be mutually agreed upon?

A. Any costs relating to the Libyan matter." (382a-373a).

Even plaintiff's counsel who suggested the ink modification conceded that defendant could not incur costs or expenses in obtaining the Libyan oil concessions without plaintiff's prior approval or consent. He testified:

"The Court: Now, first with respect to the stage up to the grant of the concession, did Occidental [under] the letter of December 17 which used the phrase 'to be mutually agreed upon' have the absolute discretion to

expend whatever sums it decided was necessary in order to acquire the concessions?

A. I would not think so." (1456a-1457a).

The Court: So you say that as far as the first phase was concerned the consent of Allen & Company was required?

A. Right." (1457a)*

This had always been the plaintiff's insistence. Prior to the London meetings in September 1964, plaintiff had repeatedly conditioned its participation in the costs of the undertaking upon its prior approval and consent. In the earlier letters exchanged between the parties it was understood that plaintiff's involvement in any Libyan undertaking would be dependent upon the mutual consent of the parties (1768a; 1770a-1771a).

Later, in the course of the London meetings, Herbert Allen again made known his determination not to be bound to any expenditure without a further opportunity of review which would include his right to withdraw from the matter if he so chose (537a-538a). This was confirmed by Herbert Allen in his letter to Dr. Hammer of December 9, 1964, wherein he again insisted that the costs of any undertaking had to be mutually agreed upon (1797a).

The lower court found that the letter dated December 17, 1964 as amended by the plaintiff did not create any binding obligation between the parties, fiduciary or otherwise, since it merely represented an agreement to agree in the future on the vital and substantial term of costs, failing which either party reserved the right to withdraw without liability. The Court accepted Dr. Hammer's testimony that it was the intention of the Allens to have "the freedom of action of deciding if they wanted to put up their money or

* The plaintiff sought to disavow the testimony of its attorney on the ground that he was not the author of the words which rendered the costs of the undertaking dependent upon the mutual consent of the parties (85a). The lower court, however, found that the attorney was either the author of or approved the phrase "to be mutually agreed upon" (*Id*).

didn't want to put up their money at any stage" of the undertaking without committing themselves in advance (82a).*

The Court found that the phrase "to be mutually agreed upon" was intentionally inserted "by plaintiff as an escape clause whereby it would not be bound to the proposed venture unless and until it approved" the costs involved (83a), which admittedly "could run into the many millions of dollars" and end up as a "dry hole" (82a). It was the finding of the trial court that Herbert Allen played the part of a "cautious financial investor who sought to protect plaintiff against the risk of extremely heavy commitments with respect to the Libyan oil concessions without its prior approval and consent" (82a). It therefore found that:

> "The evidence supports a finding that the parties did not intend to enter into a binding contractual relationship absent mutual agreement upon the costs for the acquisition and exploitation of the project." (83a).

The Court found that defendant justifiably terminated arrangement with Galic and his associates.

Galic continued to recommend replacements for those he had touted. When he resorted to recommending an "anonymous" character and requested increasing emoluments for his mysterious new find and as always, for himself, the disgust with his irresponsibility and promotional fraud, reached the breaking point (1806a; 1809a; 578a-580a; 583a-585a; 617a-619a; 696a-697a; 566a-567a; 1102a; 1175a-1176a; 38a).

On March 9, 1965 the report of de Rovin's criminal background was completed by Klehe & Company** and a copy

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* Contrary to what plaintiff urges, this testimony was properly received by the Court since it related to part of the conversation Dr. Hammer had with Herbert Allen on that very issue (538a).

** Klehe & Company was a French banking house in which plaintiff had a financial interest (38a). On March 8, 1965 Klehe & Company severed all relationships with de Rovin (P-97a).

reached Dr. Hammer on March 16, 1965. This material disclosure led to telephone conversations between Dr. Hammer and Galic and to a meeting of the principals in London on June 19, 1965. On that occasion Ogbi agreed to the cancellation of his commission arrangement and to limit his services to the registration and qualification of defendant's wholly-owned subsidiary in Libya as its attorney-in-fact and authorized representative (1822a-1826a; 482a-486a; 491a-492a; 1841a; 494a-496a; 87a; 1846a-1847a).

In the course of the meeting, Galic sought to introduce the brother-in-law of the Minister of Petroleum Affairs, a Mr. Khogia, to Dr. Hammer in the hope of persuading him to retain Khogia in place of Ogbi with regard to the concessions. This effort was rejected by Dr. Hammer who was not inclined to make any further agreements with Galic and his associates. At that time Dr. Hammer had determined to sever all connections with Galic and his group and with plaintiff and delayed doing so only until he could protect himself from possible injury at the hands of the irresponsible and dishonest representatives whom the plaintiff and Galic had brought into the matter (1101a-1102a; 491a-493a; 685a-686a; 485a). As stated by Dr. Hammer:

> "The whole thing looked like a big promotional swindle and everybody in it was engaged in a lot of hot air, so I decided then that we had to be careful to see that these people did no harm to us in Libya, and although I had made up my mind to terminate then immediately with Galic and Allen and the whole group, I felt it was better to wait until such time as we were sure that they could not harm us in Libya." (485a)

On July 16, 1965 defendant terminated all relationships with plaintiff, Galic and de Rovin (1843a-1845a). The lower court found that defendant was entirely justified in terminating the Galic group (86a-87a; 93a). It also accepted defendant's "course of action" in delaying the termination until after it had "enlisted the services of others" and had "secured from Chase Manhattan Bank" a statement of fi-

nancial responsibility which the defendant needed to "protect itself against hostile action by the Galic group" (87a). There nevertheless was such hostile action (1917a).

The Court found that the termination was accepted by plaintiff.

The defendant never wrote a reply to the cancellation letter.

It was conceded that plaintiff discussed the letter with its attorney but decided not to make any written response (38a; 88a). The contrived explanation for its deliberate silence was that its counsel thought the letter was "meaningless"!

Of equal credibility was plaintiff's claim that in a subsequent phone conversation, Dr. Hammer "withdrew" his cancellation. Dr. Hammer denied this. He testified that the Allens never questioned his right to terminate the arrangement with plaintiff (359a; 406a-407a):

> "Q. Did Charles Allen or Herbert Allen or anyone purporting to speak for them ever say to you that Occidental's letter of July 16, 1965, was meaningless?
> A. No.
>
> * * *
>
> Q. Did you ever say directly or indirectly to Charles Allen, Herbert Allen or anyone else that you were withdrawing or forgetting the July 16, 1965 letter?
> A. No." (S.M. 1156)
>
> * * *
>
> "Q. In any conversation after July 16, 1965 with Charles Allen, Herbert Allen, was anything said to you directly or indirectly by either of them or both that he or they deemed the July 16, 1965 letter * * * withdrawn or ineffectual?
> A. No." (S.M. 1157)

On the contrary, Dr. Hammer testified that he discussed the termination letter with Herbert Allen in August 1965

who at the time when only huge expenditures and no return were on the horizon, acknowledged that defendant had no alternative but to terminate all arrangements in view of de Rovin's criminal record and background (639a; 643a). This testimony was accepted by the trial court who found "that the defendant by substantial evidence has fully sustained its defense that, if there was an enforceable agreement, it was terminated with plaintiff's consent and acquiescence" (89a). The Court also found that the plaintiff had "agreed with the defendant that by reason of the acts and conduct of the Galic group it was justified in cancelling its agreement with the Galic group" (93a), and that "in sending the termination notice so accepted by plaintiff, the defendant did not violate any of plaintiff's rights" (*Id*). In making these findings, the lower court expressly rejected the contrary testimony of the Allens and their attorney on this issue (88a-90a).

The competitive bid submitted under seal was prepared by defendant without any assistance from Galic or plaintiff.

On June 1, 1965 the Kingdom of Libya announced it was accepting bids for oil concessions and invited proposed applicants to submit their bids not later than July 29, 1965 (755a; 823a; 856a; 631a). Under Libyan Petroleum Law, concessions were awarded on the basis of sealed competitive bids to those applicants who offered the best possible terms and preferences to the Kingdom of Libya (2096a-2097a; 212a-2123a). This was to assure that oil concessions would be granted on their merits in the best interests of Libya and that applications for concessions would be evaluated on the basis of their contents without regard to outside influence or intervention (1039a).

The invitation to submit bids was addressed to all qualified oil companies, including independent companies like Occidental Petroleum Corporation. To preserve the equal opportunity of the independent oil companies, it was annouced that the mere offering of huge cash bonuses to the Libyan Government alone would not be a determinative

factor in the award of any concession and that special projects were deemed far more important than cash payments (706a-707a; 1955a; 718a; 832a-833a; 1039a).

Simultaneously with its invitation for bids, the Libyan Government also published a description of the various areas available for concession grants which included thousands of square miles of acreage within the Sirte Basin previously relinquished under law by prior concessionaires (687a-688a; 707a; 2100a; 729a-730a).* Defendant, without the aid of the plaintiff or the Galic group, worked continuously in the preparation of its sealed bid, which was completed shortly prior to the deadline imposed by the Libyan Government (688a; 462a; 775a-777a; 782a-783a; 858a-859a; 558a-559a; 580a-582a).

On July 29, 1965 defendant submitted under seal its application for concessions in Libya which consisted of two huge separate bound volumes. The first volume related to its application for concessions and the second volume set forth the various preferences it was offering the Libyan Government in lieu of a cash bonus. It submitted an imaginative and original proposal for the agricultural development of the Kufra desert area and the creation of a chemical fertilizer industry within Libya which was conceived by defendant and its representatives without any assistance from Galic and his group (38a; 1848a-1912a; 2177a-2214a; S.M. 1161-1162; S.M. 1165-1166).

Under Libyan Petroleum Law, an applicant for concessions was required to comply with all local laws and regulations and to show in his application his previous experience in the petroleum industry as well as his financial and technical capacity to develop the concessions and to market any crude oil discovered (2095a). Defendant's application for concessions fulfilled all these requirements. It set forth all the relevant documents showing its compliance with all

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* Under Libyan Petroleum Law, each concession holder was required to relinquish 25 per cent of its concession grant after five (5) years and an additional 25 per cent three (3) years later depending upon the location of its concession in Libya (2100a).

local laws and regulations regarding registration and the appointment of a local representative. (1859a; 1850a; 851a-852a; 792a; 854a-856a).

The application also indicated that defendant was presently operating a number of successful oil and gas fields in California, Texas, Louisiana, Oklahoma and in various other states and that it had acquired vast experience in oil exploration and other related fields sufficient to render it eligible for oil concessions under Libyan Law as conceded by the Minister of Petroleum Affairs who considered defendant to be a very important company in the petroleum, gas, chemical and fertilizer industry (P-130; 1863a-1888a; 1895a-1910a; 1004a-1005a).

Defendant's financial capacity was confirmed by the Chase Manhattan Bank and by the various annual and intermediate financial reports of the defendant and investment letters annexed to its application. The Chase Manhattan Bank advised the Libyan Government that defendant had a net worth in excess of $67,000,000 (which exceeded the reported net worth of plaintiff by more than $17,000,000). The Chase Bank also wrote that it was "capable and experienced". The investment letters indicated that defendant was "in a strong financial position" and that its gross income for the coming year was "expected to exceed $200 million". All this documentation was carefully considered by the Libyan officials in determining defendant's eligibility for concessions (P-130; 1862a-1888a; 1895a-1910a; 1893a; 2078a-2081a; 967a-974a;408a-499a; 778a-781a).

Defendant's financial capability was never questioned by any Libyan official nor was it ever required to submit any additional financial data in support of its application. The name of Allen & Company was never mentioned by defendant in any of its discussions with Libyan officials and does not appear in its appliction for concessions. The Libyan Government never requested Allen & Company to submit any financial data in support of defendant's application and Allen & Company never submitted any such in-

formation on defendant's behalf (498a; 809a; 780a-781a; 819a-820a; 500a-591a; S.M. 1151; 782a; 969a-970a; 824a-825a; 970a-972a; 1056a-1057a).

The application for concessions also contained a letter of intent of Signal Oil and Gas Company dated July 16, 1965 expressing a willingness "to enter into a crude oil purchase contract with Occidental in the event Occidental should establish Libyan production." Signal Oil and Gas Company was a well-known international company having refineries both within and without the United States and was engaged in the worldwide exploration, purchasing and marketing of crude oil and petroleum products, and its ability to absorb whatever oil was discovered by defendant in Libya was conceded by all the Libyan officials who considered Signal Oil and Gas Company to be one of the outstanding companies in the petroleum industry (1891a; 824a-825a; 964a-967a).

In short, the defendant met all of the requirements of an attractive bid; financial responsibility, backed by the Chase Manhattan Bank, distribution outlet, and experienced management, all without *any* participation therein by plaintiff, Galic or his cohorts.

But there was something more.

The unique and original special preferences submitted by defendant in its sealed bid.

In addition to what was required under Libyan Petroleum Law, defendant also offered the Libyan Government as additional preferences, other economic and special projects in its concession application, including a firm $30 million obligation to build an ammonia plant in Libya for the manufacture of fertilizers *regardless of whether oil was discovered by defendant*, a right to use its Oxytrol process for the transportation of vegetables and produce over long distances without spoilage, and a commitment to earmark five (5%) per cent of its net operating profits derived from oil exploration in Libya for the complete agricultural development of the Kufra Oasis area where

the relatives of the King of Libya were buried which was then a small desert area with little vegetation, water or transportation facilities (1853a-1855a; 2177a- 2214a; 553a-554a; 941a-943a; 913a-914a; 726a; 816a-818a; S.M. 2899, Film entitled "Green Sahara").

The merits of these special projects had been previously discussed with the United States Ambassador in Libya and with various Libyan officials and all agreed that the offer of such preferences would be well received by the Libyan Government in evaluating defendant's application for concessions (800a-802a; 816a-818a).

In addition to Occidental, many other companies filed applications under seal with the Ministry of Petroleum Affairs in Libya on July 29, 1965. These applications represented a total of one hundred twenty separate bids submitted on behalf of more than thirty companies in competition with defendant's (39a; 1915a).

The concession areas sought by defendant in its application were determined by its vice-president and chief geologist Richard H. Vaughan without any assistance from the plaintiff or any member of the Galic group. They were selected on the basis of his professional interpretation of certain geological data and information which had been assembled and made available to him by his assistant Dr. Blom and other geologists and were focused on those areas which had been previously relinquished by prior concessionaires (702a; 775a; 868a-869a; 843a; 855a; 562a; 788a; 841a).

Occidental proposed novel "preferences", extremely costly to it, and uniquely attractive to Libya. The originality of the offer as well as the great financial risk were solely its own. The plaintiff and Galic could claim no credit for the former, and bore no burden for the latter.

Defendant won the concessions on the merits, as the Court found.

The bids were submitted to a three-man special committee created within the Ministry of Petroleum Affairs to sum-

marize the highlights of the various applications. It was a working committee having no power of recommendation and was composed of the Minister of Petroleum Affairs and two of his assistants. The summaries were submitted to the Libyan High Council of Petroleum Affairs for its consideration (956a-957a; 877a; 960a-961a; 964a; 1004a).

In preparing the summaries, the three-man committee was limited to the material appearing in the applications and was precluded from considering any private information outside the bid in rendering its report under Libyan Law. In summarizing defendant's financial ability, the committee took into consideration the Chase Manhattan Bank letter, the annual reports of defendant for the years 1962-1964, and its recent progress report and investment letters issued by financial experts; and in summarizing its market capability, the committee was unanimous in accepting without question the commitment letter of Signal Oil and Gas Company as a viable distributor. Also, the various preferences and special projects offered by defendant were carefully considered by the committee in preparing its summary. These summaries were highly confidential, and made no mention of plaintiff, Herbert or Charles Allen, Galic or his group (938a-939a; 944a-945a; 936a; 2097a; 967a-969a; 972a-974a; 964a-966a; 1004a-1005a; 903a; 979a; 968a-969a).

Under Libyan Petroleum Law, applications for concessions were required to be submitted to the High Council of Petroleum Affairs for its recommendation prior to final review and decision by the Council of Ministers and the King of Libya (2093a- 2094a; 986a; 747a; 803a). The High Council was composed of five Ministers, including the Minister of Petroleum Affairs who was its Chairman, the Governor of the Bank of Libya and three non-cabinet members having expertise in the "fields of Petroleum Affairs or Finance or Economy or Industry or Law." As Chairman, the Minister of Petroleum Affairs Fuad Kabazi had no vote upon any matter submitted to the High Coun-

cil of Petroleum Affairs in the absence of a tie vote among the other members (2093a-2094a; 975a-976a; 2117a).

After reviewing the summaries of the various applications prepared by the Committee for a week, the High Council decided to suspend further deliberations and to withhold any recommendation pending the enactment of an amendment to the Libyan Petroleum Law which was then imminent (957a; 1919a). The amendment created additional benefits in favor of the Government and expressly provided that unless the applicants for concessions signified their acceptance of the amendment in writing by a certain date, their applications would be "deemed to have been withdrawn and to be of no further force and effect" (591a).

On December 27, 1965 defendant agreed in writing to conform its application for concessions to the recent amendment to the Libyan Petroleum Law, and on December 30, 1965 offered additional benefits in favor of the Libyan Government in support of its concession application (1924a-1926a). Thus it further increased its risk.

The High Council then resumed its deliberations in January 1966. Under Libyan Law, all the deliberations and recommendations of the High Council were confidential and were not to be disclosed to any outsider by the Minister of Petroleum Affairs. In making its recommendations, the High Council was likewise precluded from considering any private information not contained in the bid applications or in the various summaries prepared by the Committee, neither of which made any reference to plaintiff, Herbert or Charles Allen, Galic or his group. The High Council completed its deliberations without the necessity of any tie-breaking vote by its Chairman Fuad Kabazi and submitted its written recommendation to the Full Council of Ministers in February 1966 for its approval as required by law (978a; 857a; 944a-945a; 968a-969a; 979a-980a; 2113a; 2123a; 975a-976a; 958a).

The Full Council was composed of nineteen Ministers, each a member of the Royal Cabinet. They met on Feb-

ruary 20, 1966 to review the recommendations of the High Council and considered only those applications which had been selected by the High Council. In reviewing the applications, the Full Council was not permitted to consider any private information outside the bids. The names of Allen & Company or Galic were never mentioned in the course of its deliberations which were very confidential. After six hours of deliberation, the Full Council of Ministers unanimously approved the recommendations of the High Council of Petroleum Affairs which was confirmed by the King on the same day prior to the announcement of the award of concessions over the local radio on February 20, 1966. Defendant was awarded Blocks 42B and 44, which later became known as Concessions 102 and 103 (982a-984a; 973a; 908a; 969a; 985a-986a; 803a; 39a).

Following the awards, defendant and the Libyan Government signed formal concession agreements. Again, the name of Allen & Company or Galic and his group were never mentioned in the contract discussions nor appeared in any of the formal documents or bond guaranties required to be filed by defendant under Libyan Petroleum Law (39a; 2014a-2023a; 2098a; 812a; 815a-816a; 819a-821a; 924a; 1061a-1062a).

The lower court found that the "evidence establishes that the bidding for the concessions was strictly competitive and that Occidental received the award solely on its own merits and financial capacity" (97a-98a). It stated that "Occidental was the successful bidder for the award not only because of its financial responsibility and technical competence, but in some measure because of the inclusion in its bid of the fertilizer and agricultural projects, one of which obligated Occidental to develop a thirty million dollar ammonia plant even if no oil were found" (103a).

All this did not assure Occidental of anything but an opportunity for huge loss or possible profit. The plaintiff still was not interested in the matter. The cancellation letter still stood uncontested by any writing.

However, when instead of a dry hole, and a resulting hollow loss, oil was found, plaintiff rushed forward for the gains to which it had not contributed a cent.

Plaintiff's perjurious evidence was exposed and the Court rejected it.

Plaintiff claimed that defendant had obtained the concessions through Galic, who it contended had continued his efforts despite his termination. Galic claimed it was his alleged relationship with Kabazi which turned the tide, an assertion which contradicted the sealed bids and all the approvals of the Ministers. This contention was based upon the false testimony of Galic and Kabazi and upon a spurious Kabazi letter prepared after the event upon official stationery which was backdated for litigation purposes (1110a-1112a; 1116a; 1094a-1098a; 1108a-1109a; 1125a; 1127a; 1134a-1136a; 881a-883a; 888a; 905a-908a; 985a-987a; 1015a-1016a; 1075a; 1927a).

At the time Galic was deposed, he was unaware of the fact that defendant had acquired possession of his private letters to de Rovin, many of them handwritten. For the first two days of his examination, Galic was never shown any of these letters and therefore felt free brazenly to deny everything he had previously written to de Rovin without fear of contradiction. On the succeeding days, however, when the witness was shown his letters to de Rovin which stultified his entire deposition, he had to admit over and over again that he had lied (1187a-1353a; 2127a-2161a; 2167a-2176a; 2218a-2229a). The Court made the inevitable finding that Galic's testimony had been so impeached as to render it wholly unacceptable and without probative value (98a).

The succession of conceded lies went to the heart of plaintiff's claim. For example, both Galic and Kabazi testified that they maintained a very close and friendly relationship beginning in later 1964 or early 1965, when in fact no such relationship existed prior to July 1965. Galic had twice attempted to arrange a meeting with Kabazi and

on each occasion Kabazi had refused to meet with him. (98a; 1095a-1098a; 1164a; 881a-882a; 2138a-2139a; 2143a-2144a).

Kabazi testified that he advised Galic surreptitiously of the specific concessions awarded to defendant prior to its official announcement, February 20, 1966, but Galic's letter revealed that this was not so:

> "I just learned that Occidental has obtained the concessions * * *.
>
> If you could learn from Lucia what numbers? and whether he [Dr. Hammer] has signed, since we cannot do anything before he has signed." (2172a)

This letter was sent two days after the Libyan Government had officially announced the awarding of concessions over the radio and the request for information was addressed to Lucia who according to Kabazi was also a crook (1038a). On April 7, 1966 Galic again wrote to de Rovin indicating his lack of knowledge regarding the signing of the concession contracts by defendant, stating:

> "One thing is sure that Hammer was yesterday Wednesday in Rome and that he left at 4:25 for Tripoli—is that he has signed or not, I do not know. My lawyer tells me that the best thing is for us that contract be signed! and I hope that will be." (2161a)

This letter was sent nine days after the concession agreements were executed between the Libyan Governmnt and defendant (1015a-1016a; 1181a-1182a; 1184a-1185a; 39a; 1038a).

Both Kabazi and Galic testified that Galic was kept fully informed of all deliberations within the Government by Kabazi following the opening of the bids for concessions, when in fact Galic was never so informed by Kabazi (881a-882a; 906a-908a; 1015a; 1135a-1136a; 1167a). Several months after the applications for concessions were opened, Galic wrote de Rovin on September 20, 1965, stating:

"I have no news, there is in the newspapers that the concessions will be given at any moment."

* * *

"I don't know what to think. Possibly one can learn something from Lucia." (2148a)

Indeed, Galic did not even know the actual date the Government would call for bids, although claiming in his deposition that he was in a position to learn that information before anyone else (1167a). On June 2 and 8, 1965, Galic wrote de Rovin complaining:

"As I see even Khogia did not know that the bids will be opened because I was in Rome with him six days earlier and I asked him to cable me because I wanted to be the first to announce to Dr. Hammer but I see that he is informed before everybody I do not know from where." (D-85)

* * *

"I send you your letter in which you announce to me that you have told me 12 days before anyone, neither Khogia nor you have known the date of the opening, it is only Dr. Hammer who has known, I do not know from where, but he is always in advance of everybody, each time you told me in 10 days or 20 days he told me no." (2133a)

Kabazi's claims of contacts with higher personages was also contradicted (907a-908a; 986a-987a; 1075a; 960a; 1063a-1064a; 1022a-1023a).

Kabazi testified that he had voted in favor of defendant in the High Council of Petroleum Affairs. But there was no tie vote and therefore he had no vote to cast (975a-976a; 2117a). Both Kabazi and Galic testified that Kabazi had divulged confidential information to Galic regarding the award of concessions to defendant prior to its official announcement, although such disclosure was prohibited by

Statute and punishable by imprisonment under Libyan Penal Law, and Kabazi knew it (882a; 906a-907a; 1015a-1016a; 1134a-1136a; 2113a; 2126a).

For purposes of suit, both Kabazi and Galic claimed that the concessions awarded to defendant were obtained through the intervention of Kabazi. But in a prior letter Galic wrote de Rovin:

> "I do not believe that you are right, since the intervention which had been made for OCCIDENTAL came from somebody in a very high position. *I do not know yet who it was, but believe me I will learn it.*" (2175a) (Emphasis supplied)

This letter was written one month after Galic allegedly received the "Kabazi letter" dated February 16, 1966 which further establishes its spurious nature (1927a). Following his investigation of the matter, Galic wrote de Rovin on June 2, 1966 to advise:

> "I have learned the truth. Ogbi did very little, and Kabazi nothing at all * * *." (2157a)

regarding the awarding of concessions in defendant's favor (2157a). In another letter which came to light, Galic recited plaintiff's statement to him that his claim against the defendant was weak since defendant had obtained the concessions by "tough bidding", rather than by negotiation:

> "It is also to a great extent my own fault, I relied on your statement that the concessions could be obtained by negotiation and then it was by tough bidding. *This is what Mr. Allen reproached me yesterday. You could have avoided that. That will be the weak point in my lawsuit.*" (2175a) (Emphasis supplied)

This one piece of evidence among so much more, revealed plaintiff's perjurious posturing at the trial.

Galic testified that he was advised by plaintiff to disregard defendant's termination cable and to continue his efforts on defendant's behalf (1110a- 1111a; 97a). He was never so advised (98a; 103a). From the very moment he received Dr. Hammer's termination cable dated July 16, 1965, Galic was determined to sue defendant and was awaiting the outcome of the awards before commencing any legal proceedings. In his letters to de Rovin dated August 8, September 18 and October 8, 1965, Galic maintained his intention to sue defendant, and on October 13, 1965 Galic wrote Herbert Allen that he would "by no means be associated with Dr. Hammer and Occidental" (1918a).

Space does not permit dozens of other written admissions. What we have cited is only the top of the iceberg in the exposure of an attempted calculated fraud upon the defendant and the Court.

It turned out that Galic had a secret financial interest in the lawsuit which rendered his testimony suspect and that of Kabazi highly questionable in view of his extreme bias and hostility toward defendant in his deposition (1119a-1120a; 1146a; 103a; 1046a-1055a).

Kabazi's pretensions of aid to the defendant were similarly false. As a member of the Council of Ministers, he had one vote out of nineteen regarding the award of any concession. In his deposition, Kabazi conceded he had not sought the solicitation of other Ministers' votes on defendant's behalf. His claim that he had obtained the support of the Prime Minister with whom he was on very bad terms and the prior approval of the King who had publicly denied any such intervention defies credulity (1063a-1064a; 1022a-1023a).

The lower court found that Galic's testimony "is belied by his own statements in letters and cablegrams sent to de Rovin" and that it "would be a work of supererogation to list the many falsehoods and contradictions in that correspondence which negate the claim now advanced that Galic played any role in furthering the application" (98a). After referring briefly to some of the correspondence which the Court believed contradicted Galic's testimony, it found:

> "Caught in a web of falsehoods by this correspondence, Galic sought to extricate himself by testifying that he lied to de Rovin to mislead him and to keep him out of the deal. But there is more than this perfidious conduct which mars his testimony. His glib and facile explanations of falsehoods and contradictions are implausible. A careful word-by-word reading of the record compels the conclusion that Galic's testimony is utterly lacking in credibility." (*Id*).

The Court also rejected the testimony of Kabazi which was replete "with inherent contradictions and implausibilities" (103a). It found that the testimony of Kabazi was "incredible and unworthy of belief" and reflected a "bias in favor of Galic and hostility towards defendant" (*Id*). The lower court observed:

> "One searches in vain for any tangible or credible evidence that in fact Galic, whether by reason of his claimed relationship to Kabazi or otherwise, played any part in furthering the application for the concessions." (*Id*)

The Kabazi Letter Exposed

In support of its claim, the plaintiff offered in evidence a letter typed in English on official stationery bearing the date of February 16, 1966 and the signature of the then Minister of Petroleum Affairs Fuad Kabazi. The letter was addressed to Galic and purported to confirm the alleged roles played by plaintiff and Galic on defendant's behalf in obtaining the concessions. The "Kabazi letter" was received in evidence subject to defendant's motion to strike. It was defendant's view that the "Kabazi letter" was spurious and prepared specially for this lawsuit (1927a; 918a; 99a).

It was proven so to be. On its face it is a contrived document because it contradicts conceded facts and is inconsistent with Kabazi's own testimony of the surrounding circumstances. Kabazi claimed that he typed it per-

sonally, but his limited command of the English language as revealed in his deposition, belies the perfect English of the letter.

The "Kabazi letter" advises who will win concessions, but he testified that no one would have had such knowledge at the time he wrote it (1927a; 983a). Furthermore, such advance "tip-off" would have subjected Kabazi to "six months imprisonment" under Article 236 of the Libyan Penal Code, in that it would have "divulged official information" prior to official announcement. Kabazi knew that it would be a crime to do what his spurious letter professed to do, and he actually disowned the letter by testifying that he had never disclosed any confidential information to any outsider (2126a; 979a-980a; 963a).

The "Kabazi letter" refers to Galic's assurance that defendant would be in a position to absorb any amount of oil found, which "assurance" was unnecessary in view of the commitment letter of Signal Oil Company attached to defendant's application. Again he contradicted the letter's authenticity by testifying that he knew of the Signal Oil letter and was satisfied with Signal Oil Company's qualifications (1927a; 1891a; 964a-967a).

The "Kabazi letter" also purported to confirm Galic's assurance that plaintiff would provide the necessary financing. Defendant's written bid for oil concessions, however, made no mention of plaintiff. The only financial information furnished by anyone other than defendant in the application was from the Chase Manhattan Bank, which Kabazi acknowledged was one of the foremost banks in the world. Kabazi testified that plaintiff's name was never mentioned to any of the Government officials who voted to grant oil concessions to defendant, nor did Kabazi ever ask for or see any financial statement of the plaintiff who in any event was not registered to do business in Libya (1927a; 1893a; 967a-972a). Whoever contrived the letter did not foresee the obvious inner contradictions which exposed its fraudulent back-dating.

Another illustration is that the "Kabazi letter" promised Galic imminent favorable decision on concessions but Galic himself denied getting such advice and further stated that Kabazi had nothing to do with defendant obtaining the concessions (1927a; 2175a; 2157a). Galic's letters, often in his own handwriting, repeatedly gave the lie to Kabazi's testimony and his own that information was being passed on to him. Indeed, Galic complained that he could not even see Kabazi (2130a-2148a; 2154a-2156a; 2158a-2161a; 2172a).

There was a fatal geographical contradiction. The "Kabazi letter" states that it was typed in "Tripoli", Libya on February 16, 1966. Kabazi testified that he was certain of this. However, Kabazi admitted that he was continuously in Beida, Libya from January to February 20, 1966, a distance of 700 miles from Tripoli, attending the meetings of High Petroleum Council of Nine and the Council of Ministers, and was in Beida on the very date the "Kabazi letter" bears (1927a; 1027a-1028a: 1025a).

One of plaintiff's own counsel supported defendant's charge that the Kabazi letter was dated back for purpose of suit.

Galic testified that *shortly after* he received the "Kabazi letter", he sent the only copy to Howard Holtzman, the senior partner of the law firm representing plaintiff. Holtzman testified that the first time he saw a copy of the "Kabazi letter" was in the Spring of 1967, more than a year after the date it bears (1143a-1144a; 1561a).

Kabazi testified that all of his correspondence with Galic was private and not official correspondence, and that he never used government stationery in corresponding with Galic. The "Kabazi letter" is typed on official government stationery (917a-918a; 1013a-1014a; 1927a).

Kabazi and Galic both stated that their correspondence was of such a sensitive and secret nature that they would immediately destroy it upon receipt thereof, yet the "Kabazi letter" was the only letter not destroyed; was allegedly

carefully preserved in a safe, and an alleged photocopy was contemporaneously made and sent to plaintiff's attorney, Howard Holtzman (1015a; 1108a-1109a; 1136a-1138a; 1140a-1141a; 1143a-1145a; 100a-101a).

Galic testified that Kabazi would always address him as "Dear Ferdo or Fernando", whereas the "Kabazi letter" is addressed "Dear Sir" (1138a 1927a). Also, the "Kabazi letter" is written in English, although Kabazi testified that he always corresponded with Galic in Italian and that Galic responded in French (1927a; 1015a).

Kabazi testified that he made a carbon copy of the "Kabazi letter" which he placed in the special file of the Ministry of Petroleum Affairs, but destroyed the carbon paper itself. By a proper authenticated certificate of the Undersecretary of the Ministry of Petroleum Affairs of the Kingdom of Libya, it was established that no such copy exists in the records of the Ministry of Petroleum Affairs (1032a-1033a; 2026a-2028a; 101a).

Expert demonstration that no carbon copy was made, was established by the Court-appointed expert, J. Howard Haring, and by the testimony of defendant's expert Ordway Hilton (2032a; 1516a-1518a). This conclusion was in accord with the testimony of plaintiff's own expert Lewis Koster and with the original draft of the report prepared by plaintiff's other expert Mrs. Tytell, which prior to its correction conceded the existence of "questionable features" regarding the preparation of any carbon copy of the "Kabazi letter" at the time of its original typing (1597a-1599a; 1606a; 1590a-1592a).*

Kabazi testified that he had typed the "letter" himself on an Olivetti typewriter either in his office or at home. The objective scientific evidence provided by defendant's expert witness, Ordway Hilton established that an Olivetti type-

* The reliability of Mrs. Tytell's expert testimony has been the subject matter of a prior decision of this Court, which affirmed the ruling of Judge Palmieri questioning her objectivity in *United States* v. *Wolfson*, 297 F. Supp. 881, 890 (S.D.N.Y. 1968), *aff'd*, 413 F. 2d 804, 806 (2 Cir., 1969).

writer was not used to type the "Kabazi letter" which was confirmed by plaintiff's own experts Mrs. Tytell and Mr. Knight. Mrs. Tytell conceded that the "Kabazi letter" was not typed on any of the portable machines belonging to Kabazi and Mr. Knight discounted the use of any Olivetti office machine (1027a-1031a; 1026a; 1498a-1506a; 1516a; 1604a-1605a; 1597a; 1586a-1587a; 1583a).

The lower court found that the "totality of evidence warrants the finding that the Kabazi letter was deliberately contrived and written sometime after the awards were announced on February 20, predated to February 16 and sent to Galic, in an effort to aid Galic in a contemplated lawsuit against Occidental". It therefore upheld defendant's contention that the "Kabazi letter" was spurious and prepared after the event for purposes of litigation (102a-103a; 99a).

Defendant risks millions—while plaintiff stands by in silence to see outcome.

After the concession agreements were executed in March 1966 and the defendant established its office in Libya, it immediately commenced oil exploration and the construction of a pipeline in addition to undertaking the agricultural development of the Kufra area involving the expenditure of many millions of dollars. These huge sums were incurred by defendant alone without any assistance from the plaintiff who never made any inquiry regarding any of these costs and expenses (647a; 673a-674a; 704a-705a; 687a; Film "Green Sahara"; 958a-959a; 793a; 893a; 274a-275a; 334a; 449a; 274a; 41a-42a; 314a; 405a).

Plaintiff's conduct contradicts its claim and confirms its acquiescence in termination.

In a prospectus issued to the public, Allen & Company Inc. and its plaintiff directors made no mention of any interest in the Libyan venture. The facts are these. On June 17, 1966 defendant made a public offering of convertible subordinated debentures in the amount of $61,186,300

through various underwriters including Allen & Company, Incorporated. The debentures allocated to Allen & Company, Incorporated were sold by it immediately upon the registration statement becoming effective.

The admissions against interest clearly applied to the plaintiff. Herbert Allen assisted in determining the conversion price of the debentures which had been offered to the public by defendant (40a; 2042a-2049a; 427a; 392a-393a).

Allen & Company, Incorporated was created by plaintiff to handle all of its underwriting business, except municipal bonds. Herbert Allen was its Chief Executive Officer and Chairman of its Board of Directors of which Charles Allen was also a member. The majority of the capital stock was owned by Herbert and Charles Allen and their children who also owned and controlled plaintiff. The employees of the corporation also rendered services to the plaintiff and were paid by both although in the beginning the corporate payroll was paid with funds supplied by plaintiff. Both plaintiff and its corporation occupied space within the same building and maintained offices on the same floor and were represented by the same law and accounting firms. For the purpose of this lawsuit, plaintiff and its corporation may be deemed one and the same (35a-36a; 41a; 2040a-2041a; 2059a-2060a; 209a-211a; 222a-223a; 235a-237a; 226a-230a; 1563a; 339a). Indeed, the lower court very aptly observed in rejecting the artful distinction sought to be created between plaintiff and its corporation by counsel:

> "Mr. Greenspoon: I would like to point out that Allen & Company was not the underwriter—
>
> The Court: It is perfectly clear to me, Mr. Greenspoon. I have sat here for four days and I have listened while a witness made the distinction between Allen & Company, Incorporated and Allen & Company, the partnership, the plaintiff in this action. I think it is fair to assume that I recognized the testimony of the witness and also that I have an aware-

ness that the directors of Allen & Company, Incorporated also included the partners who are plaintiffs in this case." (385a)

* * *

"The Court: I must say I don't understand that objection. Here is a general partner who is one of the plaintiffs in the case and he is also the chairman of the board of Allen & Company, Incorporated, in which the general partnership, as I recall it, has an interest as well as members of the family * * *." (403a)

The prospectus issued to the public described the Libyan concessions in detail and indicated that the major portion of the proceeds would be used by the defendant for oil and gas development in Libya and elsewhere. Yet it made no mention of plaintiff's alleged interest in the Libyan concessions, which omission was never questioned by the plaintiff or its attorney who had reviewed the prospectus (2043a-2045a; 224a-225a; 231a; 234a; 265a-268a; 379a-380a; 394a; 1405a).

It was conceded that the plaintiff had never advised the Securities and Exchange Commission or the potential bondholders of its claimed 25 per cent interest in defendant's Libyan oil concessions nor was any such disclosure made to any of its own customers who had purchased defendant's debentures in reliance on its prospectus (380a-384a; 386a-387a; 41a). Herbert Allen testified:

"Q. Did you believe that the customers of Allen & Company, Incorporated, who purchased the Occidental debentures on the basis of the prospectus were entitled to know, if it was a fact, that Occidental didn't own a hundred per cent of the Libyan concessions fully described in the prospectus?

A. I would assume that you are correct in that.

Q. Correct that they were entitled to know that?

A. They were entitled to know." (381a)

In connection with debenture issue, Allen & Company, Incorporated was required to file an Underwriters Questionnaire with the lead underwriter Lehman Brothers setting forth any material relationship it had with Occidental, the issuer. On May 11, 1966 Allen & Company, Incorporated executed the requisite questionnaire disclaiming any material relationship with defendant on behalf of itself, its officers and directors, and its partners (40a; 2038a-2039a; 1405a-1406a; 1425a). The disclaimer provided:

> "Neither we nor any of our directors, officers or partners have a material relationship with the [defendant]." (2038a)

The Underwriters' Questionnaire was signed by Herbert L. Stern on May 11, 1967 as vice-president of Allen & Company, Incorporated. He had full knowledge of all of plaintiff's affairs and had complete access to all its files. He had been employed by plaintiff's and its corporation for 20 years and was authorized to make the disclaimer set forth in the Underwriters' Questionnaire which plaintiff and its counsel have conceded *was accurate in all respects* (2038a; 441a-442a; 304a-305a; 444a; 1425a; 41a; 238a-239a):

> "Q. * * * 'Neither we nor any of our officers, directors, partners have a material relationship,' and so on. * * * Is that an accurate statement as of the date that this bears, which is May 11, 1966?
> A. Yes." (441a)

The function of an underwriter's questionnaire was to elicit information from members of the underwriting group having a bearing on the accuracy and completeness of the registration statement and prospectus. The S.E.C. statutes and rules require that the information set forth in the registration statement and prospectus must be accurate and complete and that both the registration statement and prospectus must disclose any material relationship existing between the issuer and the underwriter. Both plain-

tiff and its counsel were aware of these statutory obligations and disclosure requirements at the time it disclaimed having any material relationship with the defendant in May 1966 (1405a-1406a; 1404a; 213a; 440a-441a).

A material fact or relationship is any fact or relationship which may affect the value of the security offered to the public which a prudent investor ought reasonably be informed of before purchasing the security. A fact to be material need not necessarily relate to a present fact or existing condition or event but may include a prospective event even though it may not occur, provided there appears to be a reasonable likelihood of its future occurrence (91a-92a; 1426a-1429a).

Applying this test, a claimed interest in defendant's Libyan concessions would have represented a material relationship requiring disclosure in the registration statement and prospectus. The concessions awarded defendant involved many millions of dollars of potential profits in the event of success and an equally substantial amount of loss in the event of failure (91a-92a; 1431a; 1436a-1437a; 2044a; 707a-708a; 730a-731a; 450a).

Another illustration that the plaintiff did not consider that it had any interest in the Libyan concessions, is the omission of any reference to Libya in the reports exchanged between plaintiff and defendant about their various joint ventures. Three months after plaintiff had disclaimed having any material relationship with defendant regarding the Libyan concessions, it wrote defendant, on August 2, 1966, requesting audit information with regard to ventures in which plaintiff had a participation with Occidental. The Libyan matter was not mentioned in the letter nor was any information regarding those concessions requested by plaintiff. On August 12, 1966, defendant supplied the information with regard to all the other ventures requested by plaintiff which excluded the Libyan concessions. This report was accepted by plaintiff and its accountants without question in completing plaintiff's audit for the year ending July 31, 1966 (2162a-2166a; 401a-406a).

Also plaintiff had filed certified audited balance sheets for the years ending July 31, 1965 and 1966 with the Securities and Exchange Commission which made no reference whatever to its claimed 25 per cent interest in defendant's Libyan oil concessions, although other contingent liabilities were set forth. This omission was particularly significant because it was acknowledged that the Libyan concessions could involve hundreds of millions of dollars of expense. Nor was this an oversight. It was admitted that the balance sheets filed with the SEC for the years 1965 and 1966 without any reference to Libya correctly reflected all of plaintiff's contingent liabilities (2078a-2085a; 399a-400a; 322a-323a; 334a; 335a; 372a).

The lower court found that "the proof is overwhelming that plaintiff, by its acts and conduct, acquiesced in and consented to the termination of its claimed agreement with defendant", and that the plaintiff is estopped from claiming otherwise (93a).

Plaintiff's Silence Until A Gusher is Found—Estops It.

Plaintiff's suit was born only when defendant's costly gamble for oil was won. Even the first signs of success evoked only cautious debate. Prior to January 31, 1967 defendant had discovered a small amount of oil in Libya which was reported in the local papers. This led to a series of meetings among the Allens and their attorneys in which Galic participated. But no action which might involve contribution was taken until January 31, 1967 when the Wall Street Journal announced defendant's great discovery of oil in Libya. (179a-182a; 365a-366a; 368a-369a; 1386a-1387a; 1448a-1449a; 1406a-1419a).

On that same day plaintiff wrote defendant for the first time inquiring of its interest in said concessions. The opening paragraph revealed plaintiff's cunning: "We have been reviewing our agreement * * *. We would appreciate being brought up to date on * * * any production" (1941a), a mere coincidence of pouring over an old document, as if the announcement of plaintiff's oil strike was

not the cause of the "inquiry". This letter was reviewed by plaintiff's counsel. On February 11, 1967 defendant rejected plaintiff's inquiry which was made after 18 months of silence, setting forth the termination prior to the concession awards, and that Galic played no part whatsoever in the obtaining of said concessions (41a; 1941a-1942a; S.M. 1154-55; 1448a-1449a; 370a).

The lower court saw through plaintiff's pretenses. It stated "that the plaintiff sought the best of two worlds as to the Libyan oil" without any financial risk on its part:

> "If oil was struck, it could claim 25% profit in the joint venture; if it turned out to be a dry hole, it could disavow liability of 25% of the loss, pointing to defendant's termination letter. Plaintiff cannot have it both ways." (93a)

The court also pierced plaintiff's immoral position;

> "The highly speculative nature of the enterprise, entailing a risk of many millions of dollars of which plaintiff was well aware, gives added emphasis to plaintiff's acts and conduct and its silence for more than a year and a half until the public announcement of an oil gusher in the concession. Plaintiff, aware that heavy costs were involved both before and after obtaining the concession, stood by silently while defendant assumed the risk of an extremely heavy financial loss. The totality of its conduct forecloses it from now being heard." (93a-94a)

POINT I

The lower court properly found that the letter dated December 17, 1964 as amended by the plaintiff did not create any binding agreement between the parties.

Plaintiff's claim is limited to the writing dated December 17, 1964. It was conceded at the trial that the prior events and correspondence between the parties leading to

the meetings held in London between Dr. Hammer and Herbert in September 1964 did not give rise to any viable relationship between the parties regarding the Libyan concessions (331a). Indeed even on that occasion the plaintiff insisted on a veto of costs so that its risk would be controlled by it. As stated by Dr. Hammer, the plaintiff:

> "* * * wanted the freedom of action of deciding if they wanted to put up their money or didn't want to put up their money at any stage." (538a)

The plaintiff was persistently consistent when in its letter to defendant dated December 24, 1964 it again reserved its right to reject or approve any expense in advance of any commitment (1803a):

> "I am returning herewith your letter of December 17th in duplicate with just *one major change* and that is, that the cost should be 'to be mutually agreed upon' and I have initialled same.
>
> "If there is no disagreement in this matter will you be kind enough to send me an initialled copy for my files." (Emphasis added)

This reservation applied to both the Galic-Ogbi-de Rovin arrangements made in London in September 1964 ("first concessions") and to the Galic-Frottier arrangements made in November 1964 ("second concessions").

The detailed facts establishing plaintiff's choice not to be bound, was deliberate and upon the protective advice of his lawyer (1450a-1455a) Thus the matter went beyond formal contract. There was no intention to enter into a contract. So the court found: "* * * the parties did not intend to enter into a binding contractual relationship absent mutual agreement upon the costs for the acquisition and exploitation of the project", which concededly could involve many millions of dollars in a vain search for oil (83a; 82a). It found that it was the intention of the Allens to have "the freedom of action of deciding if they wanted to put up their money or didn't want to put up their money

at any stage" of the project without committing themselves in advance (82a).

The lower court was convinced that the phrase "to be mutually agreed upon" was intended by plaintiff "as an escape clause whereby it would not be bound to the proposed venture unless and until it approved any costs involved" (83a), and that Herbert Allen had insisted upon such a provision "to protect plaintiff against the risk of extremely heavy commitments" involving hundreds of millions of dollars "without its prior approval and consent" (82a).

In *Mason* v. *Rose*, 176 F. 2d 486, 489 (2 Cir., 1949), this Court held that the validity of the joint venture agreement must be determined "according to ordinary contract rules." In *Granik* v. *Perry*, 418 F. 2d 832, 836 (5 Cir., 1969), cited by plaintiff, it was stated:

> "Whether a joint venture is created depends upon the intent of the parties, determined in accordance with the ordinary rules governing contracts."

Here, the issue of intent was resolved in favor of the defendant against the plaintiff whose testimony was rejected by the lower court. Its findings are in accord with the evidence and are not clearly erroneous within the meaning of Rule 52 (a), F.R. Civ. P., especially when due regard is given to the opportunity of the court below to judge the credibility of the plaintiff and its witnesses on this very issue. *Simon* v. *New Haven Board & Carton Company*, 2 Cir., decided March 5, 1975, *Slip Opinion*, page 2031, at 2037. As this court stated in *Langford* v. *Chrysler Motors Corp.*, decided March 17, 1975, *Slip Opinion* at 2298: "Unless clearly erroneous, the evaluation of the credibility of witnesses and the weight of the evidence is the responsibility of the trial judge".

In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 433 (2 Cir., 1945), this Court held that where the findings of the lower court are based upon the credibility of witnesses and involve the issue of intent, such findings are

"unassailable" on appeal. Similarly, in *Martin* v. *Morse Boulger Destructor Company,* 256 F. 2d 675, 677 (2 Cir., 1958), this Court ruled that "questions of credibility are for the trial judge, not the appellate court."

Where the trial court makes a choice "between two discordant versions of the facts" in determining the merits, an appellate court "is not disposed to overturn a finding based on substantial evidence and the adjudication of credibility by a fact-trier". *N.L.R.B.* v. *Chain Service Restaurant, Etc., Emp., Local 11,* 302 F. 2d 167, 171 (2 Cir., 1962). As stated in *N.L.R.B.* v. *Nichols,* 472 F. 2d 1228, 1229 (6 Cir., 1927):

> "This court does not sit to retry disputed issues of fact or to redetermine issues of credibility of witnesses."

Plaintiff claims that the findings of the lower court on the issue of intent represent a legal conclusion unprotected by the clearly erroneous rule (page 2). This assertion is flatly contradicted by plaintiff's own cases, *Wyoming-Indiana Oil & Gas Co.* v. *Weston,* 43 Wyo. 256, 7 P. 2d 206, 208 (1932); *San Francisco Iron & Metal Co.* v. *Amer. Milling & Industrial Co.,* 115 Cal. App. 238, 1 P. 2d 1008 (1931). In each instance, it was held that the issue of intent to create a joint venture presented a pure question of fact and not one of law. This is in accord with New York law. *Wagner* v. *Derecktor,* 306 N.Y. 386, 390 (1954); *Stevens* v. *Amsinck,* 149 App. Div. 220, 228 (2nd Dept. 1912).

In *Babdo Sales, Inc.* v. *Miller-Wohl Company,* 440 F. 2d 962, 965 (2 Cir., 1971), it was held that the issue of intent "is uniquely one of fact", which holding was recently reaffirmed by this Court in *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.* (supra), 505 F. 2d at 1004:

> "The question of the parties' reasonable expectation is essentially a question of fact. To the extent that the district court's findings as to the scope of the exclusions depends *on the intent of the parties, they may not be upset unless clearly erroneous.*" (Emphasis added)

Plaintiff offers the novel contention that the initial discussions of the parties though resulting in no contract give rise to a fiduciary duty requiring the defendant to continue the negotiations and to conclude a valid joint venture agreement with the plaintiff (pp. 15, 32-36).* This suggestion, however, is contrary to plaintiff's own pleadings and the pre-trial order, which asserts the breach of an existing contract rather than damages for failure to create one. It is an afterthought wholly inconsistent with plaintiff's own theory of the case.** Plaintiff's counsel, contrary to its present argument, conceded that the earlier dealings between the parties did not give rise to any binding obligation (331a). In addition, the lower court found as a fact that whatever arrangement existed between the parties was terminated for cause by defendant with plaintiff's consent and acquiescence (87a; 89a; 93a).

In support of its appeal, the plaintiff cites a number of decisions like *Meinhard* v. *Salmon,* 249 N.Y. 458 (1928), which are inapplicable because they deal with joint ventures which the parties acknowledged.

Other cases cited by the plaintiff disprove its contention. Thus in *Goss* v. *Lanin,* 170 Iowa 57, 152 N.W. 43 (1915), it was conceded that in the absence of any finding of intention to create a fiduciary relationship there was no need for the Court "to consider what the duties would be had such relationship existed" (152 N.W. at 46). This is in accord with this Court's analysis of the same authorities in *Mason* v. *Rose* (supra), 176 F. 2d at 489, holding that these

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* Plaintiff's claim that defendant has admitted a fiduciary duty in its answer is unworthy of this Court's consideration (27a-28a). The fact that defendant has pleaded an affirmative defense in the alternative in accordance with the provisions of Rule 8(e) (2), F. R. Civ. P., which assumed a fiduciary relationship, does not result in a waiver of defendant's right to dispute the very existence of such a relationship with the plaintiff in this proceeding.

** In *Libby* v. *L.J. Corporation,* 247 F. 2d 78 (C.A.D.C., 1957), cited by plaintiff, an action was brought to recover damages at law for defendant's failure to form a partnership. Here, plaintiff seeks an equitable accounting of profits based upon an existing agreement between the parties (20a-24a; 43a).

cases deal with "situations where the parties had agreed in general terms upon a joint venture."

Plaintiff's brief struggles to create an unprecedented principle in law that the failure of its parties to agree on a contract may nevertheless create a fiduciary obligation between them, because of the inchoate hope which initiated the unsuccessful effort. This is an untenable proposition which would violate the basic principle of all contract law. Indeed it was plaintiff and his counsel who sought protection of the traditional law by inserting "a major" condition to relieve it of its liability.

However it is not necessary in this case to debate this theoretical absurdity. The court's finding that plaintiff had no intention to be bound makes plaintiff's contention academic as well as unsound.

POINT II

The finding of the court below that the writing sued upon was in any event, indefinite and unenforceable because of the failure of the parties to agree on all essential terms is equally supported by the evidence and not clearly erroneous.

Though the lower court found as a fact that the parties never intended to enter into any binding arrangement prior to their agreement on costs, it also held that "even assuming that the parties intended to be bound by their arrangement, costs, an essential term thereof, upon which the parties never reached an agreement, is so indefinite that the contract is unenforceable" (83a).

The Court found that the "costs" of the proposed venture represented an "item of importance" to the parties which was intentionally left open and made subject to their future agreement (82a). It was understood that these "costs" would include all the expenses in acquiring the concessions and the "additional expenses of their exploita-

tion" and would involve "many millions of dollars" without any assurance of finding oil (*Id*).

The Court found that the parties were aware of the fact that "two leading American oil companies each had expended fifty million dollars exploring concessions in Libya without getting a single barrel of oil"; that "a French oil company had a similar experience to the extent of twenty-five million dollars"; and that even the "Allens acknowledged they were aware that hundred of millions could be sunk into the ground in a vain search for oil" (*Id*).

The Court further found that the Allens had "sought to protect plaintiff against the risk of extremely heavy commitments with respect to the Libyan oil concessions without its prior approval and consent" through the insertion of the phrase "to be mutually agreed upon" in the written agreement which Herbert Allen himself described as a "major change". It was indicated that the purpose of the amendment was to afford the plaintiff "the freedom of action" of deciding whether or not to put up their money before committing itself to any particular amount by leaving open an essential term of the arrangement relating to "costs" (*Id*).

The lower court recognized that its inquiry into the enforceability of the writing did not begin and end with the phrase "to be mutually agreed upon", and that it was incumbent upon the Court to determine whether there existed sufficient objective criteria in the evidence which would permit it to fill in "the blank or open items" without doing violence to the intentions of the parties (80a-81a).*

The Court found that the exploitation of concessions involved such astronomical costs and risk capital as to make impossible the determination of any reasonable standard of investment upon which the respective obligations of the

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* Hence, the plaintiff is in error when it asserts that the Court's inquiry into the matter came to a full stop the moment it encountered the phrase "to be mutually agreed upon" (*Brief*, page 32).

parties to share in such costs and capital could be established with any degree of certainty (84a). The Court said:

> "If the parties failed to 'mutually agree' on costs to be charged against the venture, upon what basis could a court fill in that essential term? What is the standard of reasonable costs or investment for the project which plaintiff claims was the subject of the joint venture agreement?" (83a)
>
> * * *
>
> "It has not been suggested, and certainly no proof has been offered, that such amounts can be determined by industry practice, custom or usage of the trade." (84a)

The lower court found that the "costs" of acquiring and exploiting concessions in Libya involved so many uncertainties and unanswered questions as to render the entire arrangement indefinite and unenforceable (83a-85a):

> "With 'costs to be mutually agreed upon,' was the defendant free to make vast expenditures of risk capital and was plaintiff to pay 25% upon being billed, or were the expenditures subject to plaintiff's prior agreement or veto?" (83a)
>
> * * *
>
> "And if after the expenditure of that substantial sum oil was nowhere in sight, was defendant thereafter free to probe further in the hope of striking oil and to incur additional substantial expenses with plaintiff committed to pay its 25%?" (84a)

It was urged by plaintiff below that it "could no more have abandoned defendant, without paying its 25% share of the costs which were reasonably appropriate to the exploitation of the venture, than defendant could have excluded plaintiff from the venture" (83a). The lower court said:

> "This rhetorical position must yield to the realities of the situation as the parties created them. Assume defendant had expended twenty million dollars for exploitation and billed plaintiff for its 25% share, but

> plaintiff refused to pay because the funds had been expended without its approval. Who decides, and upon what criteria, whether twenty million dollars was, to use plaintiff's language, 'reasonably appropriate to the exploitation of the venture'?" (83a-84a)
>
> * * *
>
> "If the Galic group submitted a one million dollar expense bill for 'turning up' concessions and one party refused to pay the agreed upon percentage of the sum, on what basis would a court determine what items on the bill were properly chargeable against the joint venture? (84a).*

Since the plaintiff offered no evidence, and could not, to assist the Court in answering any of these questions upon which the validity of the agreement depended, and upon which it had the burden of proof, it was concluded that the arrangement between the parties was indefinite, incomplete and unenforceable (84a-85a).

The indefiniteness of the writing was underscored by the testimony of plaintiff's own counsel who sought to make a distinction between the costs involved in acquiring the concessions and the additional costs involved in their exploitation in his interpretation of the phrase "to be mutually agreed upon" which had been inserted upon his suggestion. It was his view that the phrase precluded the defendant from incurring any acquisition costs on behalf of the plaintiff without its consent, but did not affect defendant's right "to expend whatever sums it deemed necessary in exploiting the concessions", which interpretation was contradicted and disavowed by his own client (85a).

This led the lower court to conclude that such conflict of interpretation between the plaintiff and its counsel only emphasized the uncertainty which surrounded the use of

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* Similar questions were posed by this very court in support of its holding that the venture contemplated by the parties in *Mason* v. *Rose* (supra), 176 F.2d at 489-490, was likewise indefinite and unenforceable.

the phrase (to be mutually agreed upon) by the parties in their agreement *(Id)*. It was the Court's view that the parties having "left open vital matters as to costs for future agreement, as to which there are lacking definite objective criteria", rendered their entire arrangement void *(Id)*.

The law is well settled that where an essential term of the agreement is reserved for future negotiations and is dependent upon the mutual consent of the parties, the agreement is incomplete, indefinite and unenforceable. *Mayer* v. *McCreery*, 119 N.Y. 434, 439 (1890); *St. Regis Paper Co.* v. *Hubbs & Hastings Paper Co.*, 235 N.Y. 30, 36 (1923); *Ansorge* v. *Kane*, 244 N.Y. 395, 398-400 (1927); *Slater* v. *Gulf, Mobile & Ohio R.R. Co.*, 279 App. Div. 166, *aff'd*, 304 N.Y. 636 (1952).

As stated in *May Metropolitan Corp.* v. *May Oil Burner Corp.*, 290 N.Y. 260, 264 (1943):

> "A contract is incomplete and unenforceable when, as to some essential term, there has been no agreement but only an agreement to agree in the future."

It is asserted that this contract principle has no application to a joint venture agreement on the ground that mutual control over costs is deemed inherent in any joint undertaking, citing this Court's decision in *Lord* v. *Pathe News, Inc.*, 97 F. 2d 508 (2 Cir., 1938), which does not stand for the proposition urged by the plaintiff as shown by this Court's later decision in *Mason* v. *Rose* (supra), written by the same Judge who wrote the opinion in *Lord*.

In *Lord*, all the vital terms of the undertaking were agreed upon, while in *Mason*, some of the essential terms were unresolved and left to the future agreement of the parties. In *Lord*, the open items related to matters which were determinable upon the application of objective standards, while in *Mason*, the reserved items related to the very essence of the venture which did not lend themselves to any such objective determination and were so indefinite

and vague as to prevent any binding relationship between the parties. As stated by the Court below:

> "This is not a situation where prior demonstrated experience in an industry can be drawn upon in deciding what costs are reasonable and may be reasonably incurred, despite initial failure in carrying out or exploiting the purpose of a joint venture, as was the case in *Lord* v. *Pathe News, Inc.*, so heavily relied upon by plaintiff." (84a).

In *Mason*, it was urged "that an agreement creating a joint venture is in a special category and not subject to as strict a test of definiteness as contracts generally" which was rejected by this Court in an opinion holding that the validity of a joint venture agreement must be determined "according to ordinary contract rules" (176 F. 2d at 489). In *Interocean Shipping Co.* v. *National Shipping & Trade Corp.*, 462 F. 2d 673, 676 (2 Cir. 1972), this Court said:

> "Under the general principles of contract law, there is no contract if the parties fail to agree on all the essential terms or if some of the terms are too indefinite to be enforceable."

Plaintiff claims that there were objective criteria to determine the reasonable cost of exploring for oil (pp. 13-14; 49-50), and points to the "Vaughan Report" (1943a-1999a). This argument is based on misstatement of facts.

The "Vaughan Report" did not refer to the costs involved in acquiring concessions at all. It was equally silent regarding the actual cost of exploring for oil in Libya. The report did mention the approximate cost-per-barrel of producing oil in that country after a successful well had been completed. But this did not affect the enormous gap of what the Court referred to as the "astronomical costs" involved in acquiring and exploiting concessions in Libya prior to the discovery of oil (83a-84a). Indeed the "Vaughan Report" states that the "cost of exploration in Libya is high by domestic onshore standards" and that

"inordinant operating expenses should be expected in connection with any substantial activity in that country" (1945a-1946a).

Plaintiff also is mistaken when it states that defendant had never disclosed that Vaughan had gone to Libya prior to the making of his report (pp. 13, 15). As early as December 17, 1964, Dr. Hammer wrote Herbert Allen regarding the expenses incurred by Vaughan in Libya on his field trip (1799a), which information was equally available through Galic who had met Vaughan in Libya and corresponded with him regarding the concessions (1090a; 1815a-1816a).

Another misstatement is plaintiff's assertion that its net worth was greater than the defendant's (pp. 13, 15). The record shows otherwise (*Compare* 1893a with 2080a).

Aside from these egregious errors, plaintiff's contention that its deliberate reservation on costs was not material, runs into the hard fact that oil exploration costs can range from a few million to "hundreds of millions" of dollars. It was understandable and prudent for the Allens, experienced businessmen, to protect themselves against the enormous gamble involved. It is not their insistence upon escape from the risk which the Court criticized, but rather the attempted imposition upon the Court that this was not their purpose at all. The Court's finding of their true intention not to be bound is compelled by the evidence, is clearly correct and not erroneous.

POINT III

The findings of the lower court that the concessions were awarded to defendant on the merits of its sealed bid without any assistance from Galic or his group is supported by the evidence and is not clearly erroneous.

On June 1, 1965 the Libyan Government requested the submission of sealed bids for concessions. On July 29, 1965 defendant submitted its sealed bid in competition with other applicants seeking similar concessions. It was undisputed that defendant's bid was prepared without the assistance of Galic or plaintiff and that their names did not appear in defendant's application for concessions.

On July 31, 1965 all the sealed bids were opened in the presence of the applicants and their representatives as required under Libyan law. On that occasion defendant's bid created considerable comment among those present in view of the unique preferences offered by defendant in favor of the Libyan Government which were explained orally by Mr. Vaughan at the request of the Oil Minister (784a-786a; 564a; 644a; 900a-901a; 862a; photographs, D-23, D-24, D-25, D-21, D-22, 955a-956a). All this was reported in the local press:

> "Oilmen showed special interest in a bid by Occidental Oil which was accomplished by a leather-bound volume detailing how Kufra Oasis could be developed industrially and agriculturally. Occidental, which has fertilizer interests, had bid for a much-wanted area of country in the Syrtica." (952a-953a).

The various bids were processed by a committee within the Ministry of Petroleum Affairs which made a summary of all the preference offered by each applicant in support of its application. The bids and summaries were then delivered to the High Council of Petroleum Affairs for its consideration and recommendations as required under Libyan law. Their deliberations were secret and confiden-

tial, and their recommendations were based upon the merits of the bids submitted by the applicants without regard to outside influence.

The High Council of Petroleum Affairs completed its deliberations and submitted its recommendations to the Full Council of Ministers in February 1966. All the members of the High Council favored the granting of concessions to defendant without the need of any vote by its Chairman Kabazi who under Libyan law had no voice in the absence of a tie.

On February 20, 1966 the Full Council of Ministers approved the recommendations of the High Council in favor of defendant which was confirmed by the King on the same day and announced over the local radio by the Government. It was conceded that the deliberations of the Full Council were confidential and that the names of Galic or plaintiff were never mentioned by anyone in support of defendant's application. It was also conceded that Kabazi had not solicited the vote of any Minister in favor of defendant and that the Full Council had made its determination on the merits of defendant's bid.

Defendant's application for concessions fulfilled all the requirements of Libyan law. Its financial standing and ability to market any oil discovered in Libya were never questioned but conceded by all the Council members and Ministers who had approved defendant's application with legal punctilio. The lower court found and the evidence revealed that the defendant had received the concession award on the merits of its attractive bid which offered the Government many unique preferences over and above what was required by law, including a firm commitment to build a $30 million ammonia plant in Libya irrespective of whether it found oil:*

* For a better understanding of these preferences and the facts showing that defendant had acquired the concessions on the merits of its bid without any assistance from Galic or his group, see pp. 11-18, *supra.*

"The evidence establishes that the bidding for the concessions was strictly competitive and that Occidental received the award solely on its own merits and financial capacity."

* * *

"Occidental was the successful bidder for the award not only because of its financial responsibility and technical competence, but in some measure because of the inclusion in its bid of the fertilizer and agricultural projects, one of which obligated Occidental to develop a thirty million dollar ammonia plant even if no oil were found." (97a-98a; 103a)

Despite these findings which were fully supported by the evidence, the plaintiff still contends that the concessions were procured by Galic through his close relationship with Kabazi who had intervened on defendant's behalf at his request (pp. 21-23).* This contention is contradicted by Galic's "own statements in letters and cablegrams sent to de Rovin" conceding that neither he nor Kabazi had anything to do with the concessions awarded to defendant (98a). As found by Judge Weinfeld it "would be a work of supererogation to list the many falsehoods and contradictions in [the] correspondence which negate the claim now advanced that Galic played any role in furthering the application" (98a), stating:

"Caught in a web of falsehoods by this correspondence, Galic sought to extricate himself by testifying that he

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* As evidence of Galic's close relationship with Kabazi, plaintiff alludes to the "Kabazi letter" which the lower court found to be spurious and prepared after the event (102a-103a), and to the testimony of Kabazi showing that Galic had agreed to finance the production of a motion picture based upon his script in August 1965, which presumably was undertaken by Galic on behalf of a German company who had submitted an application for concessions in competition with defendant (2170a; 2129a; 1170a-1172a; 628a; 38a-39a). Initially, the lower court held that there was enough evidence in the record "to support a finding that as early as March 1965 Galic was working to obtain oil concessions for a German company, whose activity was hostile to defendant's "interest", before filing its amended opinion (105a).

lied to de Rovin to mislead him and to keep him out of the deal. But there is more than this perfidious conduct which mars his testimony. His glib and facile explanations of falsehoods and contradictions are implausible. A careful word-by-word reading of the record compels the conclusion that Galic's testimony is utterly lacking in credibility." (*Id*).

The lower court also rejected the deposition of Kabazi which was so implausible and inherently false as to render his entire testimony "incredible and unworthy of belief" (103a), stating:

"One searches in vain for any tangible or credible evidence that in fact Galic, whether by reason of his claimed relationship to Kabazi or otherwise, played any part in furthering the application for the concessions." (*Id*).

Plaintiff states that defendant conceded Galic's role in obtaining the concessions when it agreed to settle his claim in August 1966 (page 21). Evidence of the prior settlement was received subject to defendant's motion to strike since it was "clearly irrelevant" to any issue in the case (175a-176a). The lower court observed: "How does that establish the basic claim of the plaintiff in this case? * * * A man asserts a claim, the other party opposes the claim and eventually it is traded out on the basis of obtaining a general release" (123a) * * * "It wouldn't be the first time that people say that no matter how unjustified a claim was we would rather get rid of it than go to litigation. Nothing extraordinary about * * * buying * * * peace of mind" (625a).

This view was equally shared by Judge Ryan on a prior application who refused to permit any inquiry into the settlement in the depositions (172a). In *Seaboard Shipping Corp.* v. *Jocharanne Tugboat Corp.*, 461 F. 2d 500, 505 (2 Cir., 1972), this Court said "that the use of such settlements to establish liability is forbidden as a matter of sound

judicial policy", and in *Sun Oil Company* v. *Govostes,* 474 F. 2d 1048, 1049 (2 Cir., 1973), it was held:

> "Settlements are not to be used to establish liability against a party in other suits arising out of the same occurrence."

While no inference can be drawn from settling with a hostile claimant who might attempt to "becloud title," the real significance of the settlement is that plaintiff still did not consider itself a joint venturer, or it would have offered to pay its share of the expense (600a; 622a-626a; 1939a). The Court below observed "if the agreement was alive at the time, why didn't the plaintiff offer * * * 25 percent of the [settlement]" (124a).

It is next contended that the award of concessions under Libyan Law was entirely discretionary with the Ministry of Petroleum Affairs, citing Article 8 of the Libyan Petroleum Law dealing with conflicting applications for the same concession area (2097a-2098a), and that Kabazi had exercised his discretion in defendant's favor at Galic's request after obtaining the King's approval (pp. 22-3). There is no evidence showing that the Full Council of Ministers had approved conflicting applications to the same concession area and that Kabazi had resolved the conflict by awarding the concessions to defendant. On the contrary, the record shows that the Full Council of Ministers had approved the recommendations of the High Council of Petroleum Affairs on the same day it announced the awards in favor of Occidental over the local radio. In addition, the King of Libya has denied publicly and intervention on behalf of any applicant for concessions. The lower court found:

> "The record establishes that Galic's principal activities after he received the termination notice in July 1965 were not intended to and did not further defendant's interest in obtaining the concessions; rather, they were directed in furthering his own interests in building up a claim against defendant while he awaited the award

> of the concessions to Occidental as a propitious time to commence his legal action" (103a).*

In his letter to de Rovin dated March 15, 1966, Galic conceded that his claim against Occidental was weak since the concessions were obtained "by tough bidding" rather than through negotiation as promised (2175a). In *Hillyer* v. *Pan American Petroleum Corporation,* 225 F. Supp. 425 (N. D. Okla. 1963), *aff'd,* 348 F. 2d 613 (10 Cir., 1965), the agreement provided for payment of an override interest in the event plaintiffs were successful in obtaining oil concessions by negotiation. Although the defendant had obtained the concessions by submitting a sealed bid in competition with other oil companies as required by local law, the plaintiff nevertheless contended that said concessions were awarded to defendant by reason of his influence with high government representatives. The claim was rejected by the lower court and was affirmed on appeal:

> "The trial court found that Pan American's bid or offer was submitted pursuant to the provisions of the oil act and 'was accepted solely upon its merits and the advantages to the Nation of Iran'; that appellants 'were in no way instrumental in securing the oil concession * * * and their services were performed under the written agreement of April 5 which provided they would be entitled to compensation only if a negotiated concession was obtained on the terms therein set forth'. We agree, * * *." (348 F. 2d at 623).

Plaintiff argues that defendant is estopped from asserting that Galic did not turn up the concessions since it had improperly terminated his services prior to the filing of the application for concessions (pp. 20; 52-3). This contention

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* This finding disposes of plaintiff's claim that it had "persuaded Galic to cooperate and to work towards obtaining the concessions" after defendant had terminated his services (page 20).

repudiates the very basis of plaintiff's complaint alleging that the concessions were obtained through Galic's intervention (20a-21a), for it urges the opposite, namely that Galic did not perform, whatever the reason. It also disregards completely the findings of the lower court justifying defendant s termination of Galic and his group (87a; 93a).

Plaintiff conceded that the agreement with Galic was conditioned upon concessions being obtained through Galic's intervention (1773a; 1941a). Even plaintiff's counsel admitted during the trial that one of the issues was "whether Galic turned up the concessions" (346a). Yet now plaintiff argues inconsistently that such proof is unnecessary and the Court below noted the inconsistency (95a).

The Allens testified that Galic continued to perform after his termination in obtaining the concessions. The fact that their testimony was disbelieved by the trial court does not permit plaintiff to urge on appeal a new theory based upon different facts.*

The cases cited by plaintiff are inapposite (pp. 52-3). There, the issue was whether performance was waived by defendant; here, the issue is whether the concessions were obtained through Galic's intervention. There, no claim was made that the agreement had been terminated for cause which rendered academic the question of performance; here, the lower court found that the defendant was entirely justified in terminating all relationships with Galic and his group (87a; 93a).

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* While a party may plead alternative theories arising out of the same set of facts, it may not assert inconsistent claims based upon facts diametrically opposed to each other. *Senter* v. *B. F. Goodrich Company*, 127 F. Supp. 705, 707-8 (D. Colo. 1954).

POINT IV

The use of a spurious document completely taints plaintiff's claim.

In an effort to bolster its claim that the concessions were awarded to defendant through Galic's intervention, plaintiff offered in evidence the "Kabazi letter" which was received subject to a motion to strike in view of defendant's assertion that the document was spurious and prepared specially for litigation. After reviewing the evidence, the Court below upheld defendant's claim (98a-99a), saying:

> "The totality of evidence warrants the finding that the Kabazi letter was deliberately contrived and written sometime after the awards were announced in February, predated to February 16 and sent to Galic, in an effort to aid Galic in a contemplated lawsuit against Occidental." (102a-103a).

Plaintiff's claim that "there is not a word of evidence in this record to show any back-dating" (page 24), is indeed frivolous in the light of the overwhelming evidence to the contrary, most of which was set forth in the opinion below (100a-102a).

It is urged that even if the "Kabazi letter" was spurious, it was nevertheless admissible on the issue of Galic's performance in "turning up" the concessions since it revealed a very close relationship between Galic and the former Minister of Petroleum Affairs (page 22). This contention is specious. It is settled law that the use of a spurious document in the prosecution of an action renders the entire proceeding false and dishonest. *Warner Barnes & Co.* v. *Kokosai Kabushiki Kaisha*, 102 F. 2d 450, 453 (2 Cir., 1939). In *Garippa* v. *Wisotsky*, 108 N.Y.S. 2d 67, 74 (1951), *aff'd*, 280 A.D. 2d 807 (2nd Dept. 1952), *aff'd*, 305 N.Y. 571 (1953), it was held:

> "A resort to the * * * fabrication of evidence 'indicates, not a seeking after justice, but an effort to poison

> the stream of justice. The reaction is a poison to the cause of him who seeks the use it.' (citing cases)" *

The evidence shows that the Allens had engaged Galic to assist them in their lawsuit against the defendant in which Galic had a financial interest (180a-182a; 1408a-1413a; 1119a-1120a). The evidence also shows that after Galic had concluded his settlement with defendant in August 1966, he met with Kabazi in Europe to discuss the "letter" which was forwarded to him by the plaintiff (1939a; 1145a-1146a). It is conceded that the original of the "Kabazi letter" was delivered to plaintiff by Galic for use in this case and that the plaintiff had offered said letter in evidence in support of its claim and has presented evidence attesting to its alleged genuineness which was rejected by the lower court.

Under these circumstances, the acts of Galic and Kabazi in arranging the spurious document are clearly imputed to the plaintiff and binding upon it in this action. *Nolan* v. *Sam Fox Publishing Company, Inc.*, 499 F. 2d 1394, 1398 (2 Cir., 1974); *Farr* v. *Newman*, 14 N.Y. 2d 183, 187 (1964).

The lower court found that even if the "Kabazi letter" was not spurious, it would still be inadmissible on the issue of Galic's performance:

> "The defendant contends that the letter is spurious in that it was backdated, a claim that the court finds has merit. Apart from the issues, however, its contents are inadmissible hearsay and include self-serving statements. Moreover, even if it were admissible, it is of minimal probative value." (99a)

This ruling is supported by the authorities, *Woods* v. *Mahbern Realty Corp.*, 5 A.D. 2d 411, 413 (1st Dept. 1958); *Reynolds* v. *Pegler*, 223 F. 2d 429, 435 (2 Cir.), cert. denied, 350 U.S. 846 (1955), and is dispositive of plaintiff's contention to the contrary (pp. 54-5). The fact that official stationery was used to record the hearsay material does not make it admissible. *Strong* v. *United States*, 73 U.S. 788 (1867).

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* Even the court below recognized that plaintiff's use of the spurious document served no purpose other than "to expose the acts and conduct of both Galic and Kabazi" (99a).

The cases cited by plaintiff are not in point (page 55). They deal with situations where the evidence excluded involved a transaction between the parties and was offered for a purpose outside the hearsay rule. Here, the "Kabazi letter" represented a communication between strangers to the proceeding and was offered for the truth of its contents which was clearly inadmissible and without probative value.

POINT V

The finding of the lower court that the relationship between the parties was terminated for cause by defendant with plaintiff's consent and acquiescence is supported by the evidence and is not clearly erroneous.

The evidence demonstrated that Galic had engaged in a series of promotional schemes designed to induce defendant into believing that he and his associates could be useful in obtaining concessions in Libya, when in fact neither he nor any of his associates were in any position to render any assistance in that matter (86a; 98a; 102a-103a).

He first recommended that defendant engage the services of de Rovin (a convicted swindler) and Ogbi. When it appeared that neither one could be useful in obtaining concessions, Galic urged defendant to retain Frottier and his associate Slim (another crook), which likewise proved baseless. He then claimed he had contacts in high places in Libya who could be useful in obtaining concessions, although refusing to reveal their identity when requested by Dr. Hammer. These efforts were rejected by defendant who concluded "that Galic was a lot of hot air" and that his latest proposal was merely "a continuation of the same * * * sort of promotion" (618a-619a). Galic then sought to induce defendant to retain the brother-in-law of the Minister of Petroleum Affairs which was likewise rejected by Dr. Hammer who was not inclined to make any further agreements with Galic and his associates in view of the criminal report he had received regarding de Rovin. The lower court found:

> "After desultory activities by the Galic group, which were of no consequence in obtaining the concessions, information was received in March 1965 * * * that de Rovin was an imposter with an extensive criminal record * * *. By this time, the defendant, on the basis of the Galic group's actions or non-actions, was of the view that its purported power to aid in obtaining concessions was greatly exaggerated, if not false. Thus, the intelligence about de Rovin's background persuaded the defendant that any activity by the Galic group on its behalf would be detrimental rather than helpful in its efforts to obtain concessions." (86a)

Although Dr. Hammer intended to serve all relationships with Galic and his group upon receiving the de Rovin report, he was apprehensive "that a forthwith termination would cause the Galic group to try to undermine his efforts to obtain the concessions" (87a). He therefore delayed their termination until July 16, 1965 in order to protect defendant against any hostile action by the Galic group (*Id*). This cautious approach was approved by Judge Weinfeld who held that defendant was entirely justified in terminating all relationships (87a; 93a).

On July 16, 1965 defendant terminated its relationship with Galic and de Rovin by cablegram (1844a-1845a). Previously, Ogbi had agreed to the cancellation of his agreement (1841a). On the same day defendant also cancelled whatever arrangement it had with plaintiff (1843a). In its termination letter, defendant advised plaintiff that it had revoked all agreements made with Galic and his group in September 1964 because of de Rovin's criminal background, that said termination released defendant "from any commitment towards Allen & Company" under its "agreement of December 17, 1964", and that plaintiff was "likewise free to make any other arrangements [it] wish" (*Id*).*

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* Contrary to plaintiff's assertion, the termination letter did not concede any viable agreement or fiduciary relationship between the parties (page 17). A similar claim was made by plaintiff below

This letter was received by plaintiff who made no protest in writing to said termination. Dr. Hammer testified that he had a conversation with Herbert Allen regarding the termination in the course of which it was acknowledged that defendant had no alternative but to cancel all arrangements in view of the criminal record of de Rovin (88a-89a). This testimony was accepted by the lower court who rejected the contrary evidence offered by the Allens and their attorney on the issue of consent or acquiescence:*

> "It strains credulity to the breaking point to believe that if the Allens, experienced investment bankers, believed they had a 25% interest in a joint venture for the exploration of oil with a potential 'of hundreds of millions of dollars of profit in the deal,' they would not, upon receiving a written notice wrongfully terminating the arrangement, have protested or objected forthwith orally or in writing. And it defies reality and experience even more to believe that their experienced attorney, familiar with the terms of the claimed agreement and having been consulted immediately upon receipt of the termination letter, would ignore it and not have counseled his clients to challenge forthwith in writing the asserted unjustified termination, even if he were of the view that the letter was without legal effect. Disbelief is heightened by the circumstance that according to the testimony of the Allens they stated to the attorney upon receipt of the

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which was rejected by the trial court (1485a). The phrase "our agreement" in Dr. Hammer's letter obviously referred to the writing he signed in December 1964 under which "costs" had to be mutually agreed upon (603a-605a). How else would a layman refer to it? When he states that he was released "from any commitment" towards plaintiff, he was merely telling the Allens that in view of the de Rovin report, there was no need to carry on any further negotiations regarding the open items and that both parties were "free to make any other arrangements" they wish regarding the matter.

* Hence, there is no basis for the claim that the Court's finding of consent to the termination was based solely upon plaintiff's failure to respond to Dr. Hammer's termination letter (page 61).

> termina'ion letter that they felt Hammer was 'tricky' and was trying to 'freeze [them] out.'" (89a),

explaining:

> "This court is fully sensitive to the fact that in essence it is rejecting the testimony of the attorney and his clients on this subject—obviously a matter of concerned deliberation. The conclusion is based not only upon a word-by-word study of the extensive trial record, the court's trial notes which include its contemporary appraisal of witnesses, the demeanor of witnesses who testified on the issues and the reasonable inferences to be drawn from established facts and all attendant circumstances, but also upon objective facts which persuasively establish that plaintiff acquiesced in and consented to the termination of the alleged agreement" (89a-90a).

The lower court also disbelieved the testimony of the Allens that on several occasions following the termination, Dr. Hammer had orally acknowledged that their agreement was still in effect (90a):

> "I reject the testimony of the Allens that on several occasions subsequent to the receipt by them of the termination letter, Hammer orally acknowledged that the claimed contract was still in effect. Their trial testimony, at points, is contradictory and, in several instances, is at variance with their pretrial depositions."

The trial court found that even "if there were an enforceable agreement" between the parties, the agreement was terminated "with plaintiff's consent and acquiescence" (89a). It is settled law that a joint venture agreement may be terminated by the mutual consent of the parties. 48 C.J.S. Joint Adventures §4, page 819 (1947); *In re Gotfried,* 45 F. Supp. 939, 941 (S.D. Cal. 1942).

The Court held that "the proof is overwhelming that plaintiff, by its acts and conduct, acquiesced in and consented to the termination of its claimed agreement with

defendant" (93a). It further found that the plaintiff had "agreed with the defendant that by reason of the acts and conduct of the Galic group it was justified in cancelling its agreement with the Galic group" and that "in sending the termination notice so accepted by plaintiff, the defendant did not violate any of plaintiff's rights" *(Id).*

The issue of consent, essentially one of fact involving the credibility of witnesses, is exclusively reserved for the lower court's determination whose findings are conclusive on appeal unless clearly erroneous. *United States* v. *Ross,* 2 Cir., decided March 19, 1975, *Slip Opinion* at page 2378.

It is claimed that plaintiff's consent to the termination notice was invalid since it was without knowledge of all the material facts which defendant concealed or misstated at the time it cancelled the arrangement (pp. 26-27). It is asserted that defendant had never disclosed the existence of the Vaughan report and had misrepresented the facts regarding Ogbi's cancellation in the termination letter (page 57).

The Vaughan report was wholly irrelevant to the termination which was based upon the criminal record of de Rovin and upon Dr. Hammer's cancellation of the three agreements it had made with Galic, de Rovin and Ogbi in London in September 1964 (1843a-1845a; 1841a), upon which plaintiff's own arrangement was dependent.* The fact that Ogbi was continued as defendant's statutory agent in Libya at a nominal fee under a different arrangement following the termination of his September 18, 1964 agreement was immaterial and did not render false any of the statements made by Dr. Hammer in his termination letter regarding Ogbi (1846a-1847a; 1843a). As stated by the Court below:

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* The very fact plaintiff made no inquiry regarding the concessions at the time the awards were announced in February 1966, but did so after defendant had discovered oil in Libya in January 1967 without any knowledge of the Vaughan report which was produced in the course of discovery, reveals that any contention based upon the non-disclosure of the Vaughan report is a mere pretext devoid of substance.

> "This is a ministerial position required by Libyan law and it does not appear Ogbi played a substantial role in the award of the concessions to the defendant." (87a).*

Plaintiff states that the criminal record of de Rovin represented an invalid basis for the termination of the arrangement even though it was accepted without protest (page 57). *Dean Vincent, Inc.* v. *Russell's Realty, Inc.*, 521 P. 2d 334 (Ore. 1974), cited by plaintiff, is not in point. There, the joint venture was continued by the defendant after waiving its right of termination which precluded any challenge to plaintiff's right to share in the matter. Here, the claimed venture was terminated and not continued by the defendant. In *Dean*, the Court said:

> "Having thus chosen to continue with the joint venture, rather than seek to terminate it for failure of performance * * *, defendants cannot now complain."

The finding of the lower court that the plaintiff had subsequently acquiesced in defendant's termination is fully supported by the evidence.

On February 20, 1966 the Libyan Government announced the award of two concessions in defendant's favor. On March 29, 1966 the formal concession agreements were executed. On June 17, 1966 defendant made a public offering of convertible subordinated debentures in the amount of $61,168,300 through various underwriters including Allen & Company, Incorporated. The lead underwriter was Lehman Brothers, who, together with Allen & Company, Incorporated and Reynolds & Company, each agreed to purchase 10 per cent of the unsubscribed debentures of defendant's offering. The debentures allocated to Allen & Company, Incorporated were immediately sold to its customers.

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* Galic himself conceded that Ogbi had very little to do with the concession awards (2157a).

Allen & Company, Incorporated was created by plaintiff. Herbert Allen was its Chief Executive Officer and Chairman of its Board of Directors of which Charles Allen was also a member. The majority of its capital stock was owned by Herbert and Charles Allen and their children who also owned and controlled plaintiff.

The prospectus made no mention of plaintiff's claimed interest in the Libyan concessions, although indicating that a portion of the proceeds of the public issue would be used by defendant for oil and gas development in Libya. Also, the plaintiff never advised any of its customers who had purchased defendant's debentures in reliance on the prospectus that it claimed an interest in the concessions. It was conceded that plaintiff was under a duty to disclose any such interest to its customers (381a).

Allen & Company, Incorporated was required to file an Underwriters' Questionnaire with the lead underwriter setting forth any material relationship it had with the issuer. On May 11, 1966 Allen & Company, Incorporated disclaimed any such relationship with defendant, stating:

> "Neither we nor any of our directors, officers or partners have a material relationship with the company [defendant]."

The Underwriters' Questionnaire was signed by Herbert L. Stern as vice-president of Allen & Company, Incorporated. It was conceded that the disclaimer made by Mr. Stern was accurate in all respects and that it was never changed or amended by plaintiff (441a; 444a; 1425a; 41a).

The lower court found tnat the "omission in the prospectus of any claimed interest by plaintiff in the Libyan oil venture" was additional evidence of plaintiff's acquiescence and acceptance of defendant's termination (92a), saying:

> "The omission from the prospectus of any claimed interest by plaintiff in the Libyan concessions referred to therein takes on even greater significance since

> plaintiff's counsel, who had knowledge of the termination letter, read the document shortly after it was executed and neither questioned it nor suggested any changes or amendments." (*Id*).

It also found that the admission made in connection with the debenture issue that no officer or director of Allen & Company, Incorporated had a material relationship to Occidental likewise militates against any contention that plantiff "did not acquiesce in the termination notice" (*Id*).

It is claimed that the plaintiff "had absolutely nothing to do with the prospectus" and that the same equally applied to Herbert and Charles Allen (page 29), which is contrary to the evidence showing that Herbert Allen had participated in the debenture issue and had assisted in determining the conversion price of the underlying shares of stock (392a-393a), and that he had delivered a copy of the prospectus and disclaimer to his attorney for review (1386a-1389a). Even Charles Allen conceded he knew that proceeds from the debenture issue would be used by defendant for oil exploration in Libya (225a). Yet he claimed no interest in the concessions.

It is further contended that the disclaimer of no material relationship with defendant in the Underwriters' Questionnaire was not binding upon plaintiff, since neither of the Allens had knowledge of the questionnaire or its contents (pp. 27-29; 62-63). The lower court found:

> "Charles and Herbert Allen each denied knowledge of this disclaimer, *but I find that each knew of it.* The disavowal of knowledge borders on the frivolous in view of all the evidence of the relationship between the plaintiff, the two Allens and their corporate creation" (91a) (Emphasis added).

The burden of proof was upon plaintiff to show that the disclaimer made on its behalf in the questionnaire by the corporation was not binding upon it notwithstanding the very close relationship existing between the partner-

ship and the corporation by virtue of their common ownership or control (226a-227a). Having failed to meet that burden, the lower court was entitled to treat the disclaimer as an admission against interest binding upon plaintiff in ths proceeding in view of its concession that the disclaimer was accurate in all respects (92a; 441a). Moreover, the trial court had the right to assume the truth of what each of the Allens had denied in bad faith regarding their lack of knowledge of the questionnaire and disclaimer and make a finding of fact based upon that assumption in defendant's favor in the light of all the surrounding circumstances (240a-241a). *Dyer* v. *Mac Dougall*, 201 F. 2d 265, 269 (2 Cir., 1952). There, Judge Learned Hand said:

> [T]he denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."

The lower court found that the disclaimer was made by Mr. Stern on behalf of the plaintiff (91a). The plaintiff states there is no evidence showing that Mr. Stern continued to render services to the partnership after the corporation was created in 1964 (page 28). This is flatly contradicted by the testimony of Herbert Allen (442a):

> "Q. After 1964, * * *, did Mr. Stern still continue to render services to the partnership?
>
> A. Yes.
>
> Q. And did Mr. Stern have access to the partnership files?
>
> A. Yes."

In *Gottlieb* v. *Cinema Equities, Inc.*, 36 A.D. 2d 935 (1st Dept. 1971), *aff'd.* 30 N.Y. 2d 553 (1972), plaintiffs sought to assert a claim based upon an agreement omitted from the registration statement which was dismissed on the ground of public policy. As stated in *Rothschild* v. *Title Guarantee & Trust Co.*, 204 N.Y. 458, 461 (1912), and in

Scientific Holding Company, Ltd. v. *Plessy Incorporated*, 2 Cir., decided December 20, 1974, *Slip Opinion*, page 953, at 971:

> "A principle of law is: Where a person wronged is silent under a duty to speak, or by an act or declaration recognizes the wrong as an existing and valid transaction, and in some degree, at least, gives it effect so as to benefit himself or so as to affect the rights or relations created by it between the wrongdoer and a third person, he acquiesces in and assents to it and is equitably estopped from impeaching it."

Dodge v. *Richmond*, 10 A.D. 2d 4, *aff'd.* 8 N.Y. 2d 829 (1960), cited by plaintiff, is not to the contrary. There the disclaimer of interest was made in the course of a federal investigation and not in connection with a public issue. There the elements of estoppel did not exist and the Court correctly treated such disclaimer as an admission against interest. Here, defendant completed its public issue in reliance upon plaintiff's disclaimer of interest in the Libyan concessions which was sufficient to create an estoppel against the plaintiff as found by the court below (93a). See, also, *Mahoning Inv. Co.* v. *United States*, 3 F. Supp. 622, 630 (Ct. Cl. 1933).

In the court below, it was urged that the omission of plaintiff's claimed interest in the concessions was not material which was rejected by the trial court (91a-92a). On appeal, it is claimed that the real issue is not whether the relationship was in fact material, but whether the Allens believed the relationship to be material at the time of the disclaimer (pp. 28-29). Under the cases, however, the issue of materiality is determined upon an objective analysis of the facts without regard to the subjective views of the parties. *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 848 (2 Cir., 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969); *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F. 2d 341, 362-3 (2 Cir.), *cert. denied*, 404 U.S. 910 (1973); *Sonesta Int'l. Hotels Corp.* v. *Wellington*

Assocs., 483 F. 2d 247, 251 (2 Cir., 1973). The test of materiality is whether a reasonable man would attach any importance to a given fact in determining whether or not he should purchase the security. The lower court found:

> "Clearly a reasonable investor about to purchase Occidental securities under the offering would have considered it important to know that an underwriter's principals or directors had a 25% partnership interest in a project as to which the borrower, Occidental, intended to apply all or a portion of $15,000,000 of the proceeds of the issue. An investor given such information might view with more critical judgment the soundness of the offering. Cf. *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972)" (91a)
>
> * * *
>
> "A prospective purchaser of securities would also be entitled to know that Occidental did not own the Libyan oil concessions 100% and that in the event of profit it would only receive 75% thereof" (92a).

On August 2, 1966 plaintiff wrote defendant requesting audit information regarding various ventures in which it had a participation with Occidental. The Libyan matter was not mentioned in the letter request nor was any information regarding said concessions requested (2162a). On August 12, 1966, defendant supplied the information requested which excluded the Libyan concessions. This report was accepted by plaintiff and its accountants without question (2163a-2166a; 2082a-2085a). On the basis of this correspondence which was deemed "even more compelling" on the issue of acquiescence, the lower court said (92a-93a):

> "Significantly, plaintiff never mentioned the Libyan project and it accepted defendant's statements which likewise made no reference thereto. Thus, each recognized the non-existence of any joint venture with respect to the Libyan oil exploration."

It is urged that neither of the Allens ever saw the correspondence or had anything to do with it (pp. 29-30). Herbert Allen conceded the validity of the correspondence on behalf of plaintiff and testified that he "may have seen it before" (402a).

The financial records and books of account of plaintiff likewise confirm its acquiescence in the termination.

It is undisputed that plaintiff never made any provision in its financial records or books regarding its proportionate share of the expenses incurred by defendant in Libya in connection with the concessions nor ever made any inquiry of defendant regarding these expenses following the termination of its relationship.

Plaintiff filed certified audited balance sheets for the years ending July 31, 1965 and 1966 with the Securities and Exchange Commission which excluded any interest in defendant's Libyan oil concessions. The balance sheets provided for reserves for contingent liabilities, none of which related to defendant's concessions. It was acknowledged that the Libyan concessions could involve hundreds of millions of dollars and that the balance sheets filed with the SEC for the years 1964 and 1965 correctly reflected all of plaintiff's contingent liabilities. The lower court found:

> " * * * plaintiff, fully aware that substantial expenditures were being made by defendant over an extended period not only made no inquiry of it as to the costs, but never offered to make any financial contribution thereto, and failed to set up a single penny on its books as a reserve against the Libyan oil venture or make any entry therein as to any contingent liability" (93a).

17 C.F.R. §240.15c3-1, cited by plaintiff, did not prevent plaintiff from reporting its contingent liability regarding the Libyan concessions in its balance sheets if in fact it claimed an interest in said concessions. Indeed, this rule

required plaintiff to report all "liabilities on open contractual commitments" in determining its net capital requirements.

POINT VI

The plaintiff having failed to assert any claim to the Libyan concessions until after oil had been discovered by defendant without any financial risk on plaintiff's part, is precluded from seeking any relief in this action.

On July 16, 1965 defendant terminated its relationship with plaintiff (1843a). On January 31, 1967 the local press reported defendant's huge discovery of oil in Libya (41a). On the same day plaintiff wrote defendant for the first time inquiring of its interest in said concessions (1941a). On February 11, 1967 defendant rejected plaintiff's inquiry on the basis of the prior termination and the fact that Galic played no part in obtaining the concessions (1942a).

The evidence revealed that plaintiff never replied to defendant's termination letter of July 16, 1965 but remained silent for more than 18 months, which was deliberate and pursuant to advice of counsel. The evidence further revealed that after the concessions were awarded, defendant incurred substantial expenses in drilling for oil involving millions of dollars, and that those expenses were borne entirely by defendant without any contribution from plaintiff who never made any inquiry regarding the concessions or any of the expenses incurred prior to defendant's discovery of oil in Libya.

In view of plaintiff's long silence and failure to dispute defendant's termination until after oil had been discovered, defendant was required to undertake at its own risk an expensive oil exploration in Libya of a highly speculative nature without any corresponding risk to plaintiff who apparently was content to withhold its claim until such time as the Libyan venture proved successful before as-

serting it. This strategy alone is sufficient to defeat plaintiff's claim on the ground of laches which is strictly enforced by courts of equity in dealing with oil, mining or other speculatve ventures. *Patterson* v. *Hewitt,* 195 U.S. 309, 321 (1904):

> "There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property, apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

In that case, as here, plaintiffs refrained from making any claim until after ore had been discovered by defendants. There, in the interval between the rejection of its claim and defendants' discovery of the ore, plaintiffs had likewise refrained from making any offer of contribution to the expenses involved which led to the dismissal of its claim. As found by the court below:

> " * * * that the plaintiff sought the best of two worlds as to the Libyan oil project. If oil was struck, it could claim a 25% profit in the joint venture; if it turned out to be a dry hole, it could disavow liability for 25% of the loss, pointing to defendant's termination letter. Plaintiff cannot have it both ways. The highly speculative nature of the enterprise, entailing a risk of many millions of dollars of which plaintiff was well aware, gives added emphasis to plaintiff's acts and conduct and its silence for more than a year and a half until the public announcement of an oil gusher in the concession. Plaintiff, aware that heavy costs were involved both before and after obtaining

the concession, stood by silently while defendant assumed the risk of an extremely heavy financial loss. The totality of its conduct forecloses it from now being heard" (93a-94a).

This holding is fully supported by the authorities. *Hayward* v. *Eliot National Bank*, 96 U.S. 611 (1878); *Johnston* v. *Standard Mining Co.*, 148 U.S. 360 (1893); *Curtis* v. *Lakin*, 94 Fed. 251 (8 Cir., 1899); *Winn* v. *Shugart*, 112 F. 2d 617 (10 Cir., 1940); *Alexander* v. *Phillips Petroleum Co.*, 130 F. 2d 593 (10 Cir., 1942); *Hunt* v. *Pick*, 240 F. 2d 782 (10 Cir., 1957). As stated in *Pfister* v. *Cow Gulch Oil Co.*, 189 F. 2d 311, 315 (10 Cir., 1951), cited by the court below (94a):

> "A person may not withhold his claim awaiting the outcome of a doubtful enterprise and, after the enterprise has resulted in financial success favorable to the claimant, assert his interest, especially where he has thus avoided the risks of the enterprise. The injustice of permitting one, holding the right to assert an interest in property of a speculative character, to voluntarily await the event and then decide, when the danger is over and the risk has been that of another, to come in and share the profit, is obvious. In such circumstances, persons having claims to property are bound to use the utmost diligence in enforcing them.
>
> Silence under such circumstances when, according to the ordinary experience and habits of men, one would naturally speak if he did not consent, is evidence from which assent may be inferred. Where a plaintiff, with knowledge of the relevant facts, acquiesces for an unreasonable length of time in the assertion of a right adverse to his own, the court may presume assent to the adverse right, and the consequent waiver of the right sought to be enforced."

The "heads I win, tails you lose" policy adopted by the plaintiff has been repeatedly rejected by courts of equity.

The very fact plaintiff refrained from making any claim to the Libyan oil concessions until after defendant had discovered oil and incurred substantial costs at no risk whatever to said plaintiff vividly illustrates the unconscionable and inequitable nature of its position. As stated in *Westwood* v. *Cole*, 66 Misc. 53, 58, *reversed* on other grounds, 139 App. Div. 841 (4th Dept. 1910):

> "Apparently, it seems, the plaintiff was lying by to wait and see whether the business turned out sufficiently profitable to make it worth while to assert his claim to be a partner; and, when the time is come when it is worth while to assert his title, then he brings his action. To allow the plaintiff to lie by, in a case of this nature, to watch the course of results and adopt the partnership if it should be to his advantage to do so, and to abandon it on a continuance of misfortune and loss, which as a partner he must have shared, would be at variance with the plainest principles of justice. There can be no doubt that, if the Government contract had turned out to be a losing venture instead of a profitable one, the plaintiff would never have asserted any claim to be a partner; but, on the contrary, he would have protested that the defendants had expressly rescinded the contract between them and that he had acquiesced in such rescission. Now, if a party lies by, and by his conduct intimates to the other partners in the concern that he has abandoned his share, they should then be permitted to do with it as they please; if his conduct amounts to a representation of that sort he should be held estopped by it, and be precluded afterward from complaining. It would seem that the plaintiff was attempting to play fast and loose, to refuse to pay his share and then to claim the profits, if successful. He preferred to claim his share of the venture,

if it should be successful, and leave the defendants to bear the loss, if any there should be."

Courts of equity have repeatedly condemned the "Heads I Win, Tails You Lose" scheme adopted by plaintiff herein for the purpose of reaping huge profits without any financial risks to itself. A case in point is *Cray, McFawn & Co.* v. *Hegarty, Conroy & Co.*, 27 F. Supp. 93, 97 (S.D.N.Y. 1939), *aff'd.* 109 F. 2d 443 (2 Cir., 1940). There, as here, plaintiff refrained from making any claim until after the venture proved successful. There, like here, plaintiff sought to reap a huge profit without any financial risk to itself. In dismissing the complaint, the Court said:

> "The plaintiff did not risk any money, and did not do anything of importance in connection with the joint venture which Mr. Cray claims existed, nor did it make any commitments in connection therewith. It merely watched and waited until success was certain, and then came confidently in and claimed as its share 20% of the profits of the deal. *'Heads I win and tails you lose' cannot, I fancy, be the basis of an equity.*" (Emphasis added)

This principle was recognized and applied by the court in one of the very cases cited by plaintiff, *Goss* v. *Lanin* (supra), 152 N. W. at 52, in dismissing a similar joint venture claim:

> "We are satisfied from the whole record * * * that plaintiff has no standing in court, either as a corporation or as one engaged in a joint enterprise; that he played a waiting game, if, peradventure, he even had in his mind, at the time, the thought of reaping profits from the joint venture. His whole conduct is inconsistent with the theory upon which he predicates a right to recover in this suit, 'Heads I win, and tails you lose.'"

CONCLUSION

It was the plaintiff who insisted that there be no relationship between the parties, fiduciary or otherwise, unless and until it chose to commit itself to the high "risk commitment" which could involve "hundreds of millions of dollars" without any assurance of finding oil. When after initial high expeditures by defendant the element of risk had been removed by the discovery of oil, it is the same plaintiff who now asserts that the condition demanded by it for its own protection does not mean what it says, that it was never intended to prevent contractual relations between the parties and that the defendant had the absolute authority to commit it to millions of dollars in the venture without its prior approval. One can well imagine what the plaintiff would have said if defendant had not found oil in Libya and requested the plaintiff to share the losses incurred involving many millions of dollars. Then the plaintiff would have regarded the shield of its prior consent impregnable legally and morally.

The plaintiff has sought to depict in its brief a moral picture precluding the defendant from questioning the validity of the supposed venture and plaintiff's right to share in the oil discoveries in Libya when in fact the findings of the court below reveal such inequitable conduct on plaintiff's part as to preclude it from asserting any claim to the Libyan concessions in this action in view of its failure to challenge defendant's termination for more than 18 months or make any claim to said concessions until after oil had been discovered by defendant in Libya without any financial risk to plaintiff.

It has also attempted to portray in its brief surreptitious conduct by defendant in obtaining the concessions in its own name in violation of the supposed venture without plaintiff's knowledge or consent when in fact the lower court found that the concessions were awarded openly to

defendant on the merits of its sealed bid after the termination of its relationship with plaintiff who thereafter had acquiesced in said termination on several occasions prior to defendant's discovery of oil in Libya; indeed, the record shows and the trial court found that plaintiff, adopting the "Heads, I Win, Tails you Lose" game, deliberately refrained from making any claim to the concessions until after oil had been discovered by defendant in Libya so as to assure for itself a commercial windfall without any financial risk.

The court below having found all the facts in favor of defendant and having resolved all issues of credibility against the plaintiff and its witnesses, the judgment of the lower court should be affirmed in all respects with costs and disbursements to said defendant.

Respectfully submitted,

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